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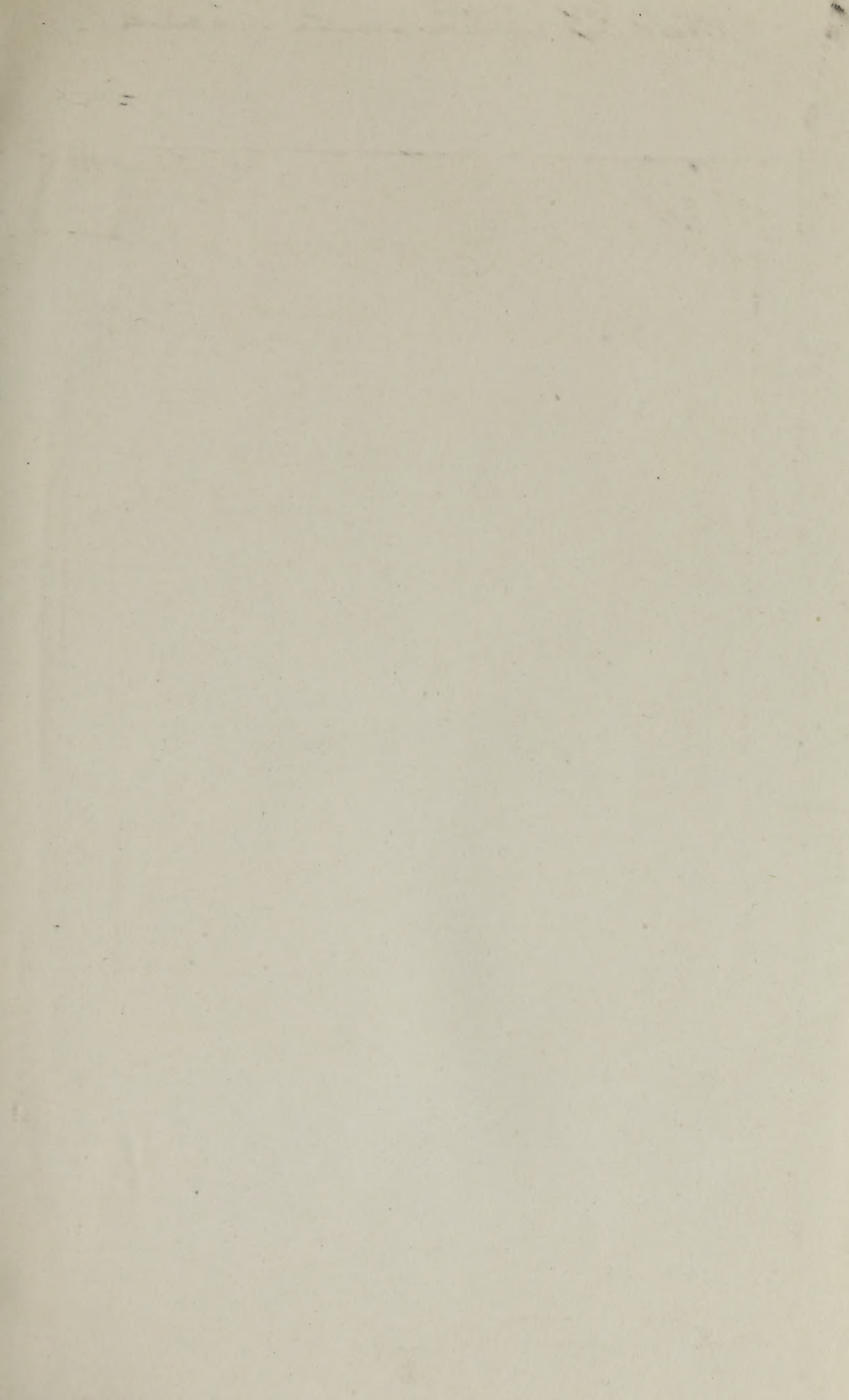
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740
No. 2560

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

COLUMBIA DIGGER COMPANY,
(a corporation),

Plaintiff in Error,

vs.

M. R. SPARKS and C. A. BLUROCK,

Defendants in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error from the United States
District Court for the Western District
of Washington, Southern Division

Filed

JAN - 6 1915

The Bell Press, Printers

F. D. Monckton,
Clerk.

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JOHN WILKINSON, Esquire,
U. S. National Bank Bldg., Vancouver, Washington,

Attorneys for the Defendants in Error.

*In the District Court of the United States for
the Western District of Washington, Southern
Division.*

COLUMBIA DIGGER CO., a Cor-
poration,

Plaintiff,

VS.

A. B. RECTOR and CHARLES
DALY, co-partners, doing busi-
ness under the firm name and
style of Rector & Daly, and M.
R. SPARKS and C. A. BLU-
ROCK,

Defendants.

Complaint

The plaintiff, for cause of action against the
above named defendants, complains and alleges as
follows:

I.

That the plaintiff is and at all times herein
mentioned was a corporation duly incorporated, or-
ganized and existing under the laws of the State of
Oregon, and having its principal office and place of
business in the City of Portland, County of Mult-
nomah and State of Oregon.

II.

That the defendants, A. B. Rector and Charles
Daly, are and were at all the times herein mentioned,
copartners doing business under the firm name and
style of Rector & Daly, and engaged in a general

contracting business in the City of Vancouver, County of Clarke, State of Washington.

III.

That the defendants, M. R. Sparks and C. A. Blurock, are and were at all the times herein mentioned, residents and citizens of the City of Vancouver, County of Clarke, State of Washington.

IV.

That on and prior to the 6th day of May, 1911, the City of Vancouver, a municipal corporation of the County of Clarke and State of Washington, had taken the preliminary measures necessary to the creation of an improvement district, and providing for the improvement of East "B" street, in said City, and had passed the necessary resolutions, ordinances and orders to carry said improvement into effect, and to let and enter into a contract for the making of said improvement, and did on said date, in compliance with said resolutions, ordinances and orders, and in furtherance thereof, and in pursuance of the law in such cases made and provided, enter into a certain contract with the said copartnership of Rector & Daly, defendants above named, for the making and completion of said improvement on said East "B" street, a copy of which contract so entered into as aforesaid by the said City of Vancouver, Washington, with the said Rector & Daly, is hereto attached and marked Exhibit "A" and specially referred to and made a part hereof.

V.

That in pursuance of said resolutions, ordinances

and orders, and in conformity with the law in such cases made and provided, at the time of the making of said contract with said defendants, Rector & Daly, and in consideration thereof and in pursuance thereof and of the law in such cases made and provided, and for the protection of sub-contractors furnishing material under said contract, said defendants, Rector & Daly, were required to and did execute and deliver to said City of Vancouver their certain bond in the sum of Twenty Thousand Dollars (\$20,000.00) signed by the said defendants as principals, and by said defendants, M. R. Sparks and C. A. Blurock, as sureties, a copy of which bond is hereto attached, marked Exhibit "B" and especially referred to and made a part hereof. That said bond was duly approved by the City Attorney of the City of Vancouver, on May 10, 1911, and thereafter filed in the office of the City Clerk of said City of Vancouver, and during all the times herein mentioned was and now is in full force and effect.

VI.

That thereafter and in pursuance of said contract and in compliance therewith, and in carrying out its terms and conditions, said defendants, Rector & Daly, did undertake the improvement of said East "B" street, and did continue in the work of constructing said improvement of said East "B" street for some time thereafter and until about the 20th day of October, 1911.

VII.

That after said contract was made by said de-

fendants, Rector & Daly, with said City of Vancouver as aforesaid, and on or about the day of May, 1911, at Portland, Oregon, said defendants, Rector & Daly, made and entered into a verbal contract with the plaintiff, wherein and whereby said plaintiff agreed to furnish and deliver unto said defendants, Rector & Daly, crushed rock, material to be used in the construction of said improvement of East "B" street, at the agreed price of \$1.25 per cubic yard for all crushed rock delivered; delivery on board scow or barge at Vancouver dock in Vancouver, Washington.

That after said contract was made and entered into, and pursuant thereto, and during the progress of the work and improvement of said East "B" street by said Rector & Daly, the plaintiff, at the special instance and request of said defendants, Rector & Daly, furnished and delivered unto said defendants, Rector & Daly, 5,481.9 cubic yards of crushed rock at the agreed price of \$1.25 per cubic yard, amounting to the sum of \$6,852.38. That no part of said sum has been paid save and except the sum of Six Hundred Forty-nine and 25/100 Dollars (\$649.25), and a credit by discount of Thirteen and 25/100 Dollars (\$13.25), or a total credit of Six Hundred Sixty-two and 50/100 Dollars (\$662.50).

That there is now due and owing from said defendants and each of them to this plaintiff the sum of Sixty-one Hundred Eighty-nine and 88/100 Dollars (\$6,189.88), together with interest thereon at the rate of six per cent (6%) per annum from and

since the 27th day of September, 1911, until paid.

VIII.

That on or about the said 20th day of October, 1911, said defendants, Rector & Daly, notified said City of Vancouver that it was impossible for them to complete said contract for said work and construction on East "B" street, and said defendants, Rector & Daly, did then and there assign and turn over all the rights under said contract to said defendants, M. R. Sparks and C. A. Blurock, sureties as aforesaid, who did then and there take full charge of the work and complete the improvement of said East "B" street, under said contract.

IX.

That said defendants, M. R. Sparks and C. A. Blurock, thereafter and on or about November 20, 1911, notified said City of Vancouver that they had accepted said contract and the completion of the work thereunder, and demanded said City of Vancouver to turn over to them all bonds for the improvement of said street for work performed on and after October 20, 1911, including the twenty per cent (20%) reserved by the city as a penalty to complete the contract. That said City of Vancouver permitted said defendants, M. R. Sparks and C. A. Blurock, to complete said contract, and thereafter delivered unto said defendants, M. R. Sparks and C. A. Blurock, and for their benefit, all the money and bonds remaining unpaid for such improvement, amounting to about Eleven Thousand Six Hundred Thirty-three and 98/100 Dollars (\$11,633.98).

X.

That all of said material was actually used in and became a part of said construction and improvement of East "B" street, as aforesaid, and the last material was furnished and delivered on September 27, 1911.

XI.

That said plaintiff, within thirty days from the date of the last delivery of material under said agreement with said defendants, Rector & Daly, as aforesaid, and within thirty days after the completion of said contract and acceptance of the work by said City of Vancouver, duly notified said City of Vancouver, State of Washington, and said defendants, M. R. Sparks and C. A. Blurock, sureties as aforesaid, and each of them, in writing, that plaintiff had furnished material to said defendants, Rector & Daly, pursuant to verbal agreement between them, for the improvement of said East "B" street, Vancouver, and that plaintiff claimed a balance due of Sixty-six Hundred Ninety-three and 68/100 Dollars (\$6,693.68), which was due and owing, and that said defendants, Rector & Daly, refused to pay same and that said amount was unpaid. That notice of said claim against said bond was duly presented to and filed with the City Clerk of City of Vancouver, State of Washington, within said period of thirty days after completion of said work under said contract and acceptance thereof by said City of Vancouver.

XII.

That plaintiff has heretofore demanded of said defendants and each of them, payment of its claims as aforesaid. That no part of said claims or said Twenty Thousand Dollars (\$20,000.00) set forth in said bond has been paid to this plaintiff.

WHEREFORE, plaintiff demands judgment against said defendants, Rector & Daly, and M. R. Sparks and C. A. Blurock, and each of them, in the sum of Sixty-one Hundred Eighty-nine and 88/100 Dollars (\$6,189.88), together with interest thereon at the rate of six per cent (6%) per annum from September 27, 1911, until paid; and for the costs and disbursements herein.

GILTNER & SEWALL,

Attorneys for Plaintiff.

Exhibit "A"

THIS AGREEMENT made and entered into this 6th day of May, A. D. 1911, by and between A. B. Rector and Charles Daly, copartners doing business under the firm name and style of Rector & Daly, both of the City of Vancouver, County of Clarke, and State of Washington, parties of the first part, and the City of Vancouver, a municipal corporation duly organized and existing under and by virtue of the laws of the State of Washington and located in the County of Clarke and State of Washington, party of the second part

WITNESSETH, That WHEREAS, said party of the second part has heretofore duly and legally

adopted a proper resolution of intention and passed a proper ordinance providing for the improvement of East "B" street in said City of Vancouver from the north line of 5th street in said city to the south line of 26th street in said city, and

WHEREAS, said party of the second part by its proper and duly authorized officers, advertised for bids for furnishing all materials and performing all labor necessary for improving said "B" street as above indicated, and

WHEREAS, said parties of the first part at the time of receiving said bids, submitted the lowest and best bid for excavating, surfacing, grading and paving said street and furnishing all the materials required by the plans and specifications for the improvements on the aforesaid street according to the plans and specifications thereof on file in the office of the City Clerk in said City of Vancouver, and

WHEREAS, at a regular meeting of the City Council in the said City of Vancouver, held on the 1st day of May, 1911, the above named Rector & Daly, parties of the first part, were awarded the contract for performing all labor and furnishing of all material required for said improvement;

NOW, THEREFORE: In consideration thereof and said agreements hereinafter contained for the said parties of the first part hereby agree as follows:

Said parties of the first part agree to furnish all materials and labor necessary for all improvements to be made on said street as aforesaid, the same

being known as Local Improvement District No. 58, in said city.

Said parties of the first part agree that the materials and work to be performed and the time and manner of furnishing and performing the same shall, in all respects, conform to the plans and specifications for the said work which said plans and specifications for the said work are now on file with the City Clerk of the said City of Vancouver, and are hereby referred to and made a part of this contract as fully as if the same were written out in full herein, and said materials and work shall be subject to inspection by the City Engineer of the said City of Vancouver or his deputy; and

The parties of the first part agree to furnish a bond for the faithful performance of the agreement to be duly approved by the proper officials in the said City of Vancouver, in the sum of Ten Thousand (\$10,000.00) Dollars, said bond to be in proper form to indemnify the said city for the faithful performance of this agreement; and

The parties of the first part shall also give their bond to the said city in the sum of Seventeen Thousand (\$17,000.00) Dollars, for the benefit of all material men, laborers, sub-contractors, and the payment of all debts incurred in the performance of this contract.

It is further understood and agreed between the parties hereof that the work herein contracted for shall be completed on or before the 1st day of July, A. D. 1911, and that said first parties shall com-

mence the construction of the sidewalks and curbs in said street under this contract before the 10th day of May, 1911, and that the same shall be completed on or before the first day of July, 1911, and that in case of failure of said parties of the first part to complete said work on or before the 1st day of July, 1911, then shall be deducted the sum of Ten (\$10.00) Dollars per day that said work remains uncompleted after said 1st day of July, 1911.

It is further understood and agreed that in case of said failure of the said parties of the first part to comply with the stipulation hereto, the City of Vancouver shall have the right to complete the work by purchasing the necessary materials and employing day labor or by sub-contract, or in any other manner as it may elect, and that the said parties of the first part shall be charged with any pay for any excess of cost over the contract prices herein resulting from said failure. It is further understood and agreed that said parties of the first part are to do and perform all things that are necessary to be done for the completion of the improvement according to the plans and specifications aforesaid.

Second party agrees to pay said parties of the first part for the said materials and labor in the manner following, namely:

Excavation per cubic yard.....	55 cents
Embankment excess per cubic yard	55 “
Concrete curb straight, per lin- eal foot	35 “

Concrete curb circular, per lineal foot	50	“
Concrete sidewalk per square foot	10 $\frac{1}{2}$	“
8-inch cast iron pipes in place, per lineal foot	75	“
6-inch cast iron pipes in place, per lineal foot	60	“
Box Culverts, per M. feet board measure	\$17.00	
Cross walks per M. feet board measure	17.00	
Catch basins complete, each..	60.00	
Inlets complete, each	20.00	
Cesspools complete, each.....	69.00	
Macadam in place, per square yard, tarvierized	64 $\frac{1}{2}$ cts.	
Macadam in place, per square yard, bitumened	64 $\frac{1}{2}$	“

Said prices to include all material and labor expended in connection with this work by said parties of the first part; payments under the contract are to be made by said second party every thirty days on estimates furnished by the City Engineer in charge of the work. Twenty per cent of the estimates shall be withheld until the contract is fully completed and accepted by the city.

The party of the second part is to issue local improvement bonds on the local improvement fund for said local improvement district of said city for all sums of money to be paid to said parties of the first part under this contract, and said parties of

the first part herein agree to receive and accept said local improvement bonds for all sums of money which they are to receive from said party of the second part under this contract.

IN WITNESS WHEREOF, the said parties of the first part have hereunto affixed their names in duplicate, and said party of the second part has caused its name and corporate seal to be affixed in duplicate by Mayor and City Clerk, on the day and year first above written.

RECTOR & DALY,

By A. B. RECTOR, Mgr.

THE CITY OF VANCOUVER,

By JOHN P. KIGGIN,

Attest:

Mayor.

JAS. P. GEOGHEGAN,

City Clerk.

(SEAL)

Exhibit "B"

KNOW ALL MEN BY THESE PRESENTS, That we, A. B. Rector and Charles Daly, copartners doing business under the firm name and style of Rector & Daly, of Vancouver, Washington, as principals, and M. R. Sparks and C. A. Blurock, as sureties, are held and firmly bound unto the City of Vancouver in the penal sum of \$20,000, lawful money of the United States of America, for the payment whereof, well and truly to be made, we and each of us, jointly and severally, bind ourselves, our and each of our heirs, executors, administrators, firmly by these presents.

The condition of this obligation is such that WHEREAS the above bounden principals, Rector & Daly, did on the 6th day of May, A. D. 1911, enter into a contract with the City of Vancouver for the improvement of East "B" street, from the north line of 5th street to the south line of 26th street in said city according to the plans and specifications therefor,

NOW, THEREFORE, if the said contractors, Rector & Daly, shall well and faithfully perform all of the covenants and conditions in said contract mentioned and shall pay all claims for labor and work or material on account of sub-contractors, material men, laborers and mechanics furnishing labor and material under said contract, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF the said parties have set their hands and seals this 6th day of May, A. D. 1911.

RECTOR & DALY,

By A. B. RECTOR, Mgr.

M. R. SPARKS.

C. A. BLUROCK.

Approved May 10th, 1911.

R. C. SUGG,

City Attorney.

STATE OF WASHINGTON,

COUNTY OF CLARKE, ss.

BE IT KNOWN that on this 6th day of May, 1911, M. R. Sparks and C. A. Blurock came before

me and being each duly sworn, each for himself deposes and says, that he is one of the sureties in the foregoing bond, that he is worth the sum of \$20,000 above all his debts, exemptions and liabilities.

M. R. SPARKS,

C. A. BLUROCK.

Subscribed and sworn to before me this 6th day of May, 1911.

JAS. P. STAPLETON,

Notary Public for the State of
Washington, residing at Van-
couver, Washington.

(SEAL)

(Duly filed).

(Title of the Court and Cause).

Answer of M. R. Sparks and C. A. Blurock

Come now the defendants M. R. Sparks and C. A. Blurock, and answering for themselves and no one else, deny, admit and allege as follows:

I.

These defendants deny each and every allegation contained in plaintiff's complaint except what is hereinafter admitted to be true.

II.

These defendants admit Paragraphs II, III, IV and VI of plaintiff's complaint.

III.

Answering Paragraph V of the complaint these defendants admit that said Rector & Daly were required to and did execute and deliver a bond to the

City of Vancouver, as alleged in said Paragraph, and that the bond was signed by the defendants Rector & Daly as principal and by M. R. Sparks and C. A. Blurock as sureties.

IV.

These defendants admit that the said Rector & Daly abandoned said contract and that these defendants completed the same.

V.

These defendants deny that they received \$11,633.98 from and on account of the completion of said contract, or any sum in excess of \$9,158.70, and that the money so received by them was used in completing the contract and paying for materials and labor which had gone into the street and for which they were held liable.

For a further and separate answer these defendants allege:

I.

That some time after the said Rector & Daly had entered upon the performance of the contract mentioned in the complaint and subsequent to the execution of the bond by these defendants and its approval by the City Attorney, and subsequent to its filing with the City Clerk, the plaintiff commenced furnishing material to the principal contractors for use in the improvement then in the course of construction on the street mentioned in the complaint.

II.

That at about the time the plaintiff commenced furnishing material to the principal contractors,

namely, Rector & Daly, for the improvement, the plaintiff and said principal contractors entered into an agreement that the plaintiff would furnish them material for the improvement then under way on the street mentioned and that the plaintiff would sell to said Rector & Daly crushed rock, sand, gravel and other material which said contractors might use for other purposes not in any way connected with this improvement, and that the payments which would be received from time to time from the improvement of the East "B" street in said city, and for which these defendants were sureties, on the bond of said Rector & Daly, should be applied to the general indebtedness of the said Rector & Daly, and that the plaintiff would look to the sureties for the pay for the material which was furnished to said East "B" street improvement; that said agreement was entered into after the execution and approval of said bond and with full knowledge on the part of the plaintiff that these defendants were sureties on the bond for the improvement of East "B" street in said city, and without any knowledge on the part of the sureties and without their consent or approval; that following the making of said agreement the plaintiff furnished material which was used in the improvement, the amount of which is unknown to these defendants, and received money from time to time from the principal contractors which was paid on account of the improvement, and that the entering into of said contract between the said principal contractors and the plaintiff without the knowledge

or consent or approval of these sureties was a fraud upon their rights and released them from liability.

For a second further and separate defense these defendants allege:

I.

That upon the entering into of the contract alleged in the complaint between Rector & Daly and the City of Vancouver, said Rector & Daly commenced to complete the improvement and continued work thereon until about the middle of October, 1911, when they abandoned the same and these sureties took charge of and completed the contract; that upon its final completion these defendants received the sum of \$9,158.70, which it was necessary for the defendants to use to pay the legal liabilities existing against the improvement and to pay for the completion of the contract.

II.

That after the contract mentioned in the complaint for the improvement of East "B" street had been entered into by the said Rector & Daly, the plaintiff commenced furnishing material for the completion of the improvement and continued furnishing material until shortly prior to the time these defendants took charge of the improvement; that these defendants have no means of knowing the amount of material furnished by said plaintiff.

III.

That an agreement was entered into between the plaintiff and said Rector & Daly that the money received from time to time for the improvement which

was to be paid and was paid to the plaintiff was to be applied on the general indebtedness of the said Rector & Daly which was unsecured, and that the plaintiff would hold these sureties liable for the material furnished for the improvement of East "B" street; that such agreement was entered into without the knowledge or consent of the sureties and that the payments made by the city on account of the improvement and which was paid to said Rector & Daly and by them to the plaintiff on account of the material furnished on said East "B" street improvement was applied by the plaintiff to the general indebtedness of the said Rector & Daly to the plaintiff and not on account of the material furnished for the improvement of said East "B" street; that the amount paid on account of the said improvement on East "B" street to the plaintiff amounted to a sum in excess of the amount now said to be due in plaintiff's complaint, viz., \$6,189.88, and plaintiff has received payments from money earned on said East "B" street improvement and paid to the principal contractors by the city and by the contractors to the plaintiff, a sum in excess of the amount claimed to be due by plaintiff, and plaintiff has been fully paid for all material furnished for the said East "B" street improvement in the said City of Vancouver, Washington, from money derived from said improvement.

IV.

That the said Rector & Daly were adjudged bankrupts by the Federal Court of this district shortly

after the said defendants undertook the completion of said contract and a trustee in bankruptcy appointed; and if these defendants are compelled to pay for the material furnished by the plaintiff they will be unable to recover anything from the said principal contractors and will suffer the entire loss if they are compelled to pay plaintiff, and that the plaintiff by reason of applying the money received on account of the said East "B" street improvement to the general indebtedness of said Rector & Daly and now holding these sureties for materials furnished for said East "B" street will be enabled to collect in full for the material sold to the said Rector & Daly and it will work a fraud upon these sureties.

WHEREFORE these defendants pray that they may go hence without day and for their costs and disbursements.

MILLER, CRASS & WILKINSON,

Attorneys for Defendants M. R.

Sparks and C. A. Blurock.

(Duly verified).

(Duly filed).

(Title of the Court and Cause).

Reply

Comes now the plaintiff above named and for reply to the answer of the defendants, M. R. Sparks and C. A. Blurock, denies each and every allegation contained in the first and second further and separate answer and defense therein and the whole

thereof, except as is admitted in the complaint, and alleges the facts to be as stated in its complaint.

WHEREFORE, plaintiff demands judgment as prayed in its complaint.

GILTNER & SEWALL,
EDWARD J. BRAZELL.

(Duly verified).

(Duly filed).

(Title of the Court and Cause).

Stipulation

IT IS HEREBY STIPULATED between the attorneys for the respective parties in the above entitled matter that this cause may be tried before the court without a jury, and that the trial set for Tuesday, October 28, 1913, be continued and tried before the Court without a jury whenever the Court can reach it after the close of the present jury session.

Dated this 21st day of October, A. D. 1913.

GILTNER & SEWALL,
Attorneys for Plaintiff.

MILLER, CRASS & WILKINSON,
Attorneys for Defendants M. R.
Sparks and C. A. Blurock.

(Duly filed).

(Title of the Court and Cause).

Findings of Fact and Conclusions of Law

And now on this day this matter coming on for hearing, the plaintiff appearing with it its attorneys, and the defendants M. R. Sparks and C. A. Blurock appearing, and with them their attorneys, and a

jury having been waived by stipulation of the respective parties, in writing, filed with the Clerk, and both sides being ready for trial, the testimony was taken and concluded, and the Court having taken the matter under advisement and the respective parties having submitted written briefs and the Court being now fully advised, finds:

I.

That the plaintiff is and at all times mentioned in the pleadings herein was a corporation duly incorporated, organized and existing under the laws of the State of Oregon and having its principal office and place of business in the City of Portland, County of Multnomah, State of Oregon.

II.

That the defendants A. B. Rector and Charles Daly are and were at all times herein mentioned, co-partners doing business under the firm name and style of Rector & Daly, and were engaged in the general contracting business in the City of Vancouver, Clarke County, State of Washington.

III.

That the defendants M. R. Sparks and C. A. Blurock are and were at all times herein mentioned residents and citizens of the City of Vancouver, Clarke County, State of Washington.

IV.

That no service of summons or complaint was made upon the defendants A. B. Rector and Charles Daly, and no appearance filed by either of said parties in this court, in this matter; that since the trial

and while the same has been under advisement plaintiff moved to dismiss as to the defendants A. B. Rector and Charles Daly and the Court finds that said motion should be granted.

V.

That the City of Vancouver, Washington, is a corporation organized under the laws of the State of Washington, and a city of the third class.

VI.

That prior to the 11th day of May, A. D. 1911, the City of Vancouver passed the necessary resolutions providing for the improvement of East B street in said city from the north line of Fifth street to the south line of Twenty-sixth street; that in pursuance to due and legal notice therefor a contract for the furnishing of material and performing of the work required by the plans and specifications on file in the office of the City Clerk was awarded to the defendants Rector & Daly.

VII.

That following the awarding of said contract to said defendants, said Rector & Daly entered into a contract with the City of Vancouver, Washington, for the furnishing of the material and performance of the work required by the plans and specifications; that in order to secure the faithful performance of the contract said Rector & Daly were required to furnish a bond as required by the provisions of Sections 1159, 1160 and 1161, Rem. & Bal.'s Code of the State of Washington, in the sum of Twenty Thousand Dollars conditioned as required by the

statutes referred to, and thereafter did file with the City Clerk of said City of Vancouver a bond conditioned as required with the defendants M. R. Sparks and C. A. Blurock as sureties.

VIII.

That following the execution of the contract and bond above mentioned said Rector & Daly entered upon the performance of such work and continued in the performance of the contract until about the 20th day of October, A. D. 1911, when they abandoned the same and the sureties on the bond, the defendants M. R. Sparks and C. A. Blurock, were required to complete the improvement, and the sureties, upon the abandonment of the work by the said Rector & Daly, took charge of the work and completed the improvement.

IX.

That while the said Rector & Daly were engaged in carrying out the said contract and making the improvement of the street mentioned they purchased from the plaintiff material to be used in the construction of said improvement, consisting of crushed rock, at the price of \$1.25 per cubic yard delivered; that in pursuance of said agreement the plaintiff furnished crushed rock to the said Rector & Daly, which was used in making the improvement of said street, amounting to the sum of \$6,852.38.

X.

That subsequent to entering into the contract with the City of Vancouver for the making of the improvement mentioned the said Rector & Daly en-

tered into an arrangement with the Vancouver Trust & Savings Bank of Vancouver, Washington, wherein the monthly estimates coming from said improvement were assigned to the Vancouver Trust & Savings Bank and in consideration thereof the said Vancouver Trust & Savings Bank advanced money from time to time to the said Rector & Daly for the carrying on of said contract and for the payment of the labor and material used and expended in the improvement; that the money received from the improvement by the said Vancouver Trust & Savings Bank and by it paid to the said Rector & Daly and to their creditors was a sum far in excess of the value and cost of material furnished by the plaintiff and used in the improvement mentioned.

XI.

That the said Vancouver Trust & Savings Bank paid to the plaintiff from time to time a sum in excess of the amount due plaintiff for the crushed rock furnished to said Rector & Daly and which was used in making the improvement of said East B street, and the money so paid to the plaintiff was money which was paid by the Vancouver Trust & Savings Bank against the estimates for the improvement as the work progressed, and estimates were furnished by the City Engineer, and the money paid to the plaintiff through said Vancouver Trust & Savings Bank was realized from the work and improvement of said East B street on account of which the defendants M. R. Sparks and C. A. Blurock were sureties and were the same moneys for

the collection and payment of which the sureties were obligated and that the amount thus paid to the plaintiff by the Vancouver Trust & Savings Bank from money earned from the improvement of said street was a sum in excess of the material furnished by plaintiff and used in making the improvement.

From the foregoing findings of fact the Court concludes:

I.

That the money received by plaintiff from the City of Vancouver on account of the improvement of said East B street, and paid to the plaintiff through the Vancouver Trust & Savings Bank, should be applied in payment for the material furnished by plaintiff and used in the improvement.

II.

That plaintiff has received on account of said improvement and from money earned in making the improvement a sum in excess of material furnished and used in the improvement and which fully satisfies and liquidates plaintiff's claim.

III.

That plaintiff's action should be dismissed and the defendants M. R. Sparks and C. A. Blurock have judgment for their costs and disbursements.

Dated this 25th day of July, A. D. 1914.

(Signed) EDWARD E. CUSHMAN,

Judge.

(Duly filed).

(Title of the Court and Cause).

Judgment

And now on this day this matter coming on for hearing before the Court upon the motion of the defendants, M. R. Sparks and C. A. Blurock, for judgment, and it appearing that the Court has heretofore made and entered Findngs of Facts and Conclusions of Law in this matter and that under such Findings of Fact and Conclusions of Law these defendants are entitled to judgment,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED That the plaintiff takes nothing, that the prayer of the plaintiff be denied, and that the defendants, M. R. Sparks and C. A. Blurock, have judgment for their costs and disbursements.

Dated this 25th day of July, A. D. 1914.

EDWARD E. CUSHMAN,

Judge.

(Duly filed).

(Title of the Court and Cause).

Bill of Exceptions

BE IT REMEMBERED, That heretofore and upon, to-wit, the 14th day of April, A. D. 1914, the above entitled cause came on duly and regularly for hearing in the above entitled court before HON. E. E. CUSHMAN, Judge of the above entitled Court, without a jury, a trial jury having been duly waived by written stipulation of the parties, duly filed with the Clerk before the commencement of said trial.

The plaintiff herein being represented by its attorneys and counsel, Messrs. Giltner & Sewall, and

The defendants herein being represented by their attorneys and counsel, Messrs. Crass & Wilkinson,

AND THEREUPON, The following proceedings were had and done, to-wit:

Counsel for the respective parties, having addressed the Court in an opening statement, the plaintiff herein, to further maintain the issues in its behalf, introduced the following evidence, to-wit:

DIRECT EXAMINATION.

It was stipulated that the plaintiff is a corporation, organized under the laws of the State of Oregon.

M. A. HACKETT was called as a witness on behalf of the PLAINTIFF, and being duly sworn, testified as follows:

I live in the City of Portland, Oregon, and am president and manager of the plaintiff. It is a corporation in the sand and gravel business, for producing and selling sand and gravel. Its place of business is Portland, Oregon. It was engaged in business in Portland in 1911.

I am acquainted with Mr. Rector, one of the defendants. Rector & Daly are a partnership. Their business in 1911 was general contracting and they were engaged in it at Vancouver, Washington.

Q. Did the Columbia Digger Company have any business with Rector & Daly in the early part of the year 1911, and if so, state what that business was?

A. Yes; Mr. Rector came over to our office in Portland in the early part of 1911, I think in the fore part of April, and wanted to make arrange-

ments for sand and gravel; he wanted to buy sand and gravel and for us to deliver it in Vancouver, and he also said that he had some contracts, or was about to get some contracts, where he was going to use about ten thousand yards of crushed rock, and he wanted to know what he could get his crushed rock for, and so I told him I would give him some sand and gravel, told him what I would give him sand and gravel for. "Now," he said, "I will have to pay cash for this sand and gravel, and I want it cheap for cash," and it was agreed that he would pay cash for it, and I told him he could have the gravel for eighty cents a yard, delivered on the bank or in the bunkers at Vancouver, and sand for sixty cents a yard, a very low price. Then he wanted to know what he could get the rock for, but as I was not in the rock business and had nothing to do with the rock business, I called up Mr. Hume, who was the agent for the Riverside Rock Company, and asked him what I could get crushed rock for in Vancouver. He said he could let us have crushed rock for eighty-five cents at the quarry, per yard, and I told Mr. Rector that I would boat it there, and unload and deliver it at Vancouver for forty cents per yard, which would make it a dollar and a quarter a yard.

Q. Well, state what occurred when you made the agreement with him for the sale of crushed rock for use on East B street, about what time and what the agreement was? .

A. Well, I think later, along some time in June, he stated that he wanted us to deliver him some

crushed rock, I think on Fourth Plain avenue and B street, and that he would be ready for rock at any time, so I called Mr. Hume to find out when he could make deliveries to us on the barges, and Mr. Hume wanted to know where we were going to get our money for this crushed rock. I called Mr. Hume, and we went over to Vancouver and saw Mr. Rector, and he said that he could not pay cash for the crushed rock, but as soon as he got his money off of B street, why he would pay for the crushed rock, and that he would have to ask us to wait for the money until he did get his money from B street, and we asked him what surety we would have if we waited for our money, and he said that he had a bond to the city to pay for all labor and material, a good bond, and mentioned who was on the bond, Mr. Blurock and a man named Sparks, I think, and so, under those conditions, we thought we were perfectly safe in furnishing him the rock and waiting until he got his money off B street, so we began to make deliveries as soon as we could.

We furnished Rector and Daly 5,481.9 yards of rock for use on B street at \$1.25 per yard. \$662.50 has been paid and the balance unpaid is \$6,189.88. The last delivery of rock must have been somewhere about the last of September or the first of October. I think September 27th is right. In rendering an account of this crushed rock to Rector and Daly there was no dispute about it. They admitted the account. They admitted to me that all of this rock went into the improvement of East B street. Rector

and Daly abandoned the work on East B street the fore part of October—along there. After they abandoned this work I had a notice served on the city and on the bondsmen. I have made a demand for the payment of this money from Rector and Daly personally. This money, which I just stated is due for crushed rock furnished East B street. I first made demand from them and then I made demand from the bondsmen. I do not know when I made it.

CROSS EXAMINATION.

I had the active control of this business while it was being carried on. I was the manager. Of course, I had my two sons working along with me under my directions, and they had a good deal to do with the management of it. There were just myself and my two sons.

I think we first started in on our arrangement of furnishing some sand and gravel before we furnished any crushed rock. We commenced furnishing sand and gravel as early as May. It may have been before that, but I think it was as early as that. We were paid for it as it was furnished, on the start. I think we began to deliver the rock for East B street to the bunkers there on barges the very last of June or the first of July; somewhere right close in there. I think we furnished some crushed rock before that, but I do not think that went on this street. I understood it went on Fourth Plain or some other street. Of my own knowledge I do not know where the first I furnished went. I know

about how many yards were furnished. Prior to the B street contract we furnished about 1,200 yards; three barge loads. I was told it went on Fourth Plain street. I could not tell exactly how many yards there were in that. I have not looked that up very closely—not lately. But I know there were three barge loads and that would be about 1,200 yards. We were paid for that the fore part of July. I think we were paid for that before this work had commenced on East B street.

Q. Before you commenced furnishing any material for East B street?

A. Well, now, I do not know—I think we began furnishing material for East B street along the first part of July or the latter part of June, and I think about the 10th of July, along there somewhere, we got paid for the rock we furnished before, this twelve hundred yards. I was surprised to get the money and discounted it, if I recall, some.

I do not recall what amounts we were paid. There were no sureties on Fourth Plain for the improvement, so far as I know. I do not think so. Mr. Rector was going to pay us for the first rock we furnished cash. I could not tell for sure whether they were working on East B street when we got our money that we applied on the Fourth Plain debt.

Q. Hadn't they been working there for three or four months?

A. They might have been grading and putting down sidewalks and things of that kind.

The first crushed rock furnished on B street, I

think was on July 1st. It might have been the latter part of June.

The bill of particulars which we furnished to you shows that the first rock furnished that went on East B street was furnished June 25th.

I have not our books here for the purpose of showing these dates.

Q. Then Rector & Daly were working on this street at the time you received the payment in July that you say was for the rock furnished on Fourth Plain. That is right, is it not?

A. Oh, no. We got only \$662.50 for the crushed rock we furnished on East B street. I could not tell without looking it up how much money we received altogether from Rector and Daly during that time. I know that Daly settled up with us in full somewhere about the first of July.

Q. Now, look at that bill of particulars again. That shows, doesn't it, that you received payment during the time Rector & Daly were working on this contract a total of \$9,812.15; \$2,500.00 ought to be taken off of that on a dishonored check; that would leave \$7,312.15 that you received during the time that Rector & Daly was working on this contract at the time you furnished rock?

A. I guess that is right, but we were not to get any pay for rock on East B street until he got his money.

Q. That's all right. You received that amount of money during the time you were furnishing this rock?

A. That statement (indicating paper) looks as though we received that amount of money. He owed it to us on sand and gravel and other rock, but not on East B street.

I did not know that he was getting money from East B street all of this time. We applied all of the money that we received from him during all of this time on this other indebtedness that he owed us for; it was due. After the application of those payments, Rector and Daly still owed us something on the other indebtedness; somewhere between \$500 and \$600 for sand and gravel.

Q. Well, that was furnished prior to this time. As shown by this bill of particulars, as sworn to by yourself, all of the material and all of the liability which Rector & Daly owed you was entirely wiped off by the application of payments you received during this time excepting for crushed rock?

A. Yes, sir.

Q. You did that when you found that Rector & Daly had gone into bankruptcy, didn't you?

A. No, sir; it was not then that we knew that they had gone into bankruptcy.

Q. You knew that Messrs. Sparks and Blurock were responsible men, looked them up and found that they could pay?

A. Yes, sir.

Q. And so, when you found that out, and found that Rector and Daly had no financial responsibility, then you proceeded to take all of the money you received during this time and wiped off all of the

unsecured indebtedness and came back on Sparks and Blurock because they were responsible?

A. No, sir.

Q. Was not that the understanding with Rector that you would do that?

A. No, sir. Never had any understanding with Rector about anything of that kind. The only understanding I had with Rector was that he was to pay me cash for all sand and gravel I delivered there, and was to pay cash for the rock we delivered on Fourth Plain, and he got behind in his payments, and we were drumming him up for payments, and all at once he got a payment for a lot of work that he did on Fourth Plain, got quite a little money all at once, and he came in and paid us all up, because he got that money from Fourth Plain; that is my understanding.

Mr. Rector on the start paid us for the sand and gravel when we furnished it, but then he got negligent and we had to carry him along.

Q. And during the time that he was working on East B street, at no time did he pay you for sand and gravel?

A. When he was working on East B street?

Q. Yes.

A. I know that he owes us for some yet that was delivered on B street.

During the time that we were furnishing crushed rock for East B street, from the time we first started, during all of that time when we were furnishing sand and gravel, they at no time paid us for sand

and gravel promptly upon delivery, and the only payments were checks given to us from time to time in large amounts.

Q. During this time, notwithstanding the fact as you said that you had an agreement with him that he was to pay you cash when you sold him sand and gravel, during all of that time he never did pay you cash when you delivered a load or a barge of sand, isn't that true?

A. I said on the start that he paid us cash, but during the time that he was working on B street, I said I did not know when he started on East B street.

I and my counsel have stated here that I had an understanding that we were not going to simply hold these sureties on East B street, but that I had to have cash for our sand and gravel, and that the money we were receiving from time to time was to pay for the sand and gravel.

Q. Now, I want you to tell whether or not during this time you received any pay for your sand and gravel?

A. During what time?

Q. During the time you were furnishing crushed rock for East B street?

A. We might have not received any money for sand and gravel then, but I think we did. I think that along about the 15th of July, we were furnishing crushed rock then for East B street, and that he paid me quite a little money then for sand and gravel and some for crushed rock, too.

He did not pay right on the date it was delivered; along about that time we could not get him to do it. Whenever he paid us in a large check, we applied it on what he owed us, and what he agreed to pay us on first, and left the crushed rock to be paid for when he got his pay, which I did not suppose he would get until it was completed. I didn't know that he was getting paid every few weeks. I told him we would wait until the job was finished. He did not tell me at the time I had this talk with him about his sureties on that street, that he would get his pay, based upon the engineer's estimates every two or three weeks. According to the bill of particulars, on July 5th we furnished 973 yards of crushed rock, coming to \$1,216.25. We have never been paid for that. We got this check for \$1,216.25 and the money out of it.

This check—I recall this check. We got one check, and I guess that is the one, \$1,216.00, and it says on it, "for crushed rock." We were not expecting to get any money for crushed rock, and he owed us for sand and gravel, and when I saw the check, I told him that that should not be for the crushed rock; that he still owed us for about three thousand dollars' worth of sand and gravel, and that he must pay for his sand and gravel, and so I called Mr. Rector up by 'phone and I told him we had got a check and that it had marked on it for crushed rock, and I says, "we are not expecting any money on the rock, and we want our sand and gravel paid for first," and Mr. Rector said that it didn't make

any difference; that we could apply that on the sand and gravel; that that was just a mark that he put on there.

Q. This was given to you as payment for crushed rock which went on East B street, wasn't it?

A. —and I told Mr. Rector—(interrupted).

MR. GILTNER: WAIT until he answers.

MR. MILLER: Complete your answer.

A. Well, I told Mr. Rector that I want him to pay for my sand and gravel first; that I had no security for it.

Q. That is the idea exactly.

A. And that this check had marked on it, "for crushed rock," and that I did not want that; that I wanted him to pay me for the sand and gravel, and he said, "that is a memorandum that the bookkeeper had put on there, and you can apply that on payment for the sand and gravel," and I told my bookkeeper to do it.

Q. Now, you have stated exactly the correct proposition; you knew you had received this check for crushed rock, and you knew that Sparks and Blurock were sureties on that and were good, so you wanted to apply that on the unsecured account and that under that arrangement with Rector you could do that?

A. I supposed Rector and Daly were good for it then, too, but I did not know whether he had got any money on East B street or not.

Q. What difference did it make to you whether

it came off from East B street, or not, if it was for crushed rock? You notice on the corner of this check it says "nine hundred and seventy-three yards of crushed rock," you notice that?

A. Yes, sir.

Q. It says "for crushed rock." It went on East B street, you will admit that?

A. Yes.

Q. That was for nine hundred and seventy-three yards of crushed rock you stated in your bill of particulars that went on East B street?

A. I do not know as I said it went on East B street.

Q. Why did you swear to this bill of particulars?

A. I knew at the time probably that it went on East B street, but I am not sure now that it went on East B street.

Q. That is what you are suing us for, \$1,216.00 for these particular barges of rock, is it not?

A. Yes, sir.

Q. What particular sand and gravel did he owe you for at this time?

A. I do not know what particular sand and gravel but he owed us about three thousand dollars, I know; I had the man look it up, and he owed us a whole lot, about three thousand dollars that he was behind on that we couldn't get our pay out of him for.

Q. How much did he owe at that time for crushed rock?

A. I do not know; I think he owed us considerable for crushed rock, too, but we were not to demand payment for that, because we did not suppose that he was going to pay for it until he got his money.

Q. And you did not propose to accept any payment off of that street until all else was paid for?

A. Certainly, we would have accepted payment off of that street—(interrupted).

Q. But not until everything else was paid for?

A. Oh, yes; we would have accepted money off of that street, too, if we could have got it, but this agreement with Mr. Rector was that he was to pay us for sand and gravel first.

Q. That agreement with Mr. Rector was that all money should be applied on the sand and gravel account first because you could look to the bond on East B street. Is not that true, as a matter of fact?

A. No, sir; that is not true.

I have not told a dozen people so within the last three or four days. I don't think I was ever in your office. My son has been there two or three times. There is a check for \$1,000 dated October 10th; that is when it was made out.

Q. Do you know the circumstances under which that check was issued?

A. Why, I suppose for money that he owed us.

We were not furnishing him sand and gravel at that time, but he still owed us for sand and gravel. Maybe we were furnishing him crushed rock on

October 10th. I do not know positively.

Q. I want to recall something to your mind, Mr. Hackett. Is it not true that you had a barge of rock ready for delivery over at Vancouver, or ready to be taken to Vancouver, and you told Mr. Rector you would not deliver that barge of rock unless he gave you a thousand dollars?

A. I never told him any such thing, and I do not remember of any such case.

Q. Don't you know that you had a barge of rock that you would not deliver until you got a thousand dollars?

A. No, sir.

Q. And that this was given to you before you would—this thousand dollars was given to you (indicating check) before you would deliver that barge of rock?

A. No, sir; I would have delivered the rock whether he would have given me the check or not, and I was willing to furnish it until he got his money to pay me. It might have been for a load of sand and gravel.

I am not sure whether we were furnishing sand and gravel at this time. I have no books here showing whether we were furnishing sand and gravel at that time. I have never refused at any time to furnish him crushed rock or demanded my pay before he got it.

MR. SEWALL: Here it is on the second statement (indicating).

MR. GILTNER: We are willing to have that in-

troduced in evidence; it shows the dates and everything.

MR. MILLER: I am not bound by the statement; I am asking him as a matter of fact.

On July 10th a check was issued for \$649.25 and we gave credit for that.

Q. How did you come to do that? Because at that time he owed you for sand and gravel, didn't he?

The date of this check is July 10th; it was paid July 11th.

A. We received some payment on the rock.

Q. I am now referring to the check for \$1,-216.00, to which I called your attention awhile ago. You say that on August 11th, you discovered that he was paying you a check for crushed rock, and you told him you wanted to apply it on the sand account.

A. I told him that I wanted him to apply this check on the sand account; that he owed us for sand, but that the check was marked for crushed rock, and it seems to me that the next checks that he had marked rock he didn't owe us anything for sand at that time, so we credited rock.

Q. Here is a check for \$649.25—\$662.50 is what you gave us credit for. Here is one dated July 11th, which says on its face, "for crushed rock," about a month before this other one that you say he was owing you for an old account on sand and gravel.

A. I think that along in the fore part of July

he settled up with us for all the sand and gravel, and then along about the time when this came in, I do not think that he owed us anything for sand and gravel about that time, the 10th of July, and we applied it on the rock that he owed us on, and then later on, why, he got some more sand and gravel from us, and then I wanted my sand and gravel paid for first, as he agreed to pay me cash for sand and gravel, and then when he sent a check to pay for rock I applied it on the sand and gravel.

Q. Can you find on that bill of particulars where he paid you for sand and gravel during that time?

A. This is just a statement of the amounts that he owed us.

Q. Yes. Is there anything there showing that he paid you for sand and gravel in July or prior to the issuance of this check for \$662.50?

A. It does not show on that particular sheet, sand and gravel, and I do not know why that should be for sand and gravel.

Q. This is just the cash payments that you received?

A. This is a statement of sand and gravel (indicating), and this is a statement of cash payments for sand and gravel (indicating).

Q. Where are those payments for sand and gravel, showing that you were paid up in full during this time when you say that this check came in?

A. I do not know as I can tell by this, but I know that I recollect that Mr. Rector—(interrupted).

THE COURT: If the bill of particulars is there, that is a matter that speaks for for itself.

THE WITNESS: I am not a bookkeeper myself, and I cannot explain all of this.

Defendant here offers in evidence defendants' Exhibits 1, 2 and 3, and the same are received without objection.

Q. I call your attention to another check, July 17, 1911, for \$859.90. Did you receive that?

A. (Examining check). I guess I did. It is not marked "crushed rock," though.

Q. It is just marked "on account"?

A. Yes, sir.

MR. MILLER: I will offer it in evidence.

MR. GILTNER: I object to its introduction in evidence unless he shows what it was for.

Q. You received that during the time you were furnishing this crushed rock to Rector & Daly, did you not? You received it July 17th or 18th, did you not, 1911?

A. I think we furnished him crushed rock at the same time.

This check is offered and received in evidence without objection and marked defendant's Exhibit 4.

Defendant offers in evidence defendant's Exhibit 5, and the same is received in evidence without objection, and the witness testifies that this check is not on the bill of particulars.

Q. I show you a check for three thousand dollars; did you receive that?

A. Yes.

Q. That is dated September 6th?

A. Some of these checks were dated ahead.

Q. They were dated ahead and were not paid until he could get an estimate on East B street?

A. I do not know that.

Q. They were dated ahead?

A. Yes; and he asked us to hold them until that time, but he did not say anything about East B street to me.

Q. You knew that was where it would come from?

A. No, sir.

Q. It is dated September 6th, and paid September 7th, for \$3,000. We will offer that in evidence.

(No objections).

THE COURT: It may be admitted.

Whereupon said check is admitted in evidence and marked defendants' Exhibit No. 6.

Q. I show you another check for \$501.64, June 23, 1911. You received that, didn't you?

A. Yes. That is not for crushed rock, because that was before we delivered anything to East B street at all.

MR. MILLER: I will offer that in evidence.

Said check was received in evidence without objection, and marked defendants' Exhibit 7.

Witness testifies that the plaintiff received money for all of the checks offered in evidence and received checks at the time they bear date.

RE-DIRECT EXAMINATION.

Q. When Mr. Miller showed you the check dated October 10th for \$1,000.00, he asked you if you had not demanded that on a barge of rock?

A. Yes, sir; he asked me that.

Q. What was the fact about that?

A. Well, I do not know anything about that.

Q. When did you cease to furnish rock?

A. Well, on—(interrupted).

Q. If you know?

A. Well, I could not tell exactly; I did not furnish any rock to Rector & Daly after they told us they had abandoned the street.

Q. Was the last rock furnished on September 27th, showing you this bill of particulars (indicating)?

A. Yes; according to this statement.

RE-CROSS EXAMINATION.

Q. I just want to ask you this question—you may not know about it. You say that you did not furnish them any rock after they threw up the street?

A. Yes, sir.

Q. That was about the 20th of October when they quit?

A. At what time?

Q. The 20th of October?

A. I do not remember exactly when they quit; I know they notified us, and then we sent a notice, and that notice will tell the date that they quit.

Q. That notice is dated October 17th, is it not?

A. I do not know; I have not seen it.

Q. Well, I have a copy of it here. I assume that is the date?

A. Yes.

Q. Is it not true, about this barge I was asking you about, that it was brought up to the dock and that it remained there several days, and that the charge that was made against it was made when it was shipped and not when it was unloaded—the time you received the \$1,000.00 was at the time it was unloaded, but on the barge and had been there for several days?

A. I do not recall any barge being there for several days.

RE-DIRECT EXAMINATION.

The check for \$3000.00, dated September 6th, 1911, was paid on account of sand and gravel.

Q. Did he pay you \$3,000.00 at that time for sand and gravel?

A. I guess he did.

The check for \$501.64, dated June 23, 1911, was paid on crushed rock that was furnished before we started on East B street. He owed us that before.

Q. I hold in my hand a check dated July 5, 1911, for \$1,017.49; I will ask you what that check was given for, in payment for what?

A. This is July 5th (indicating)?

Q. Yes; that was paid on crushed rock or on sand and gravel?

A. It is marked for crushed rock; I think that check was paid for crushed rock that was furnished

for Fourth Plain, because I do not think there had been any rock delivered on B street then.

The check for \$859.90, dated July 17, 1911, was paid upon sand and gravel; so was check dated October 10, 1911.

RE-CROSS EXAMINATION.

Q. Now, you say this was paid on this account and that account; have you got any books here showing when and where you made the application of those payments?

A. I have no books here; no.

Q. And you say now you applied it on the sand and gravel account, because that is the way you wanted to apply it; that is right?

A. We applied it on the sand and gravel account because Rector said he would pay us for sand and gravel, and because we agreed to wait for him upon the rock until he got his money, and Rector & Daly did not pay us anything else but sand and gravel and crushed rock.

Q. Yes, and crushed rock, and you applied it all on the sand and gravel?

A. There was some that we did not apply on sand and gravel.

Q. You did not furnish any sand and gravel for East B street?

A. Yes, we did; quite a lot of sand and gravel for East B street, but as he agreed to pay us cash for sand and gravel, we did not put in any claim for sand and gravel that went on East B street. We furnished him sand and gravel that went on

East B street for sidewalks and curbs that we did not get our pay for, either.

Q. Did you sell to Wentworth?

A. No, sir; Rector and Daly had some that went other places.

Q. You do not know how much went on there?

A. I know that all of the sand and gravel that Rector used on East B street he got from the Columbia Digger Company.

Q. But you do not know how much he used, of your own knowledge?

A. Yes, I do; I do not know as I can tell the exact figures, but it must have been a number of thousand yards—it was over a thousand yards, anyhow, and I do not know but it was more; I could not tell how much, but I know all of the sand and gravel Rector built his sidewalks and curbs on East B street with was sand and gravel bought from us.

Q. But that sidewalk was built along in April and May?

A. Well, I could not tell, but the sidewalks were built before the street was.

Q. Before you furnished any crushed rock at all?

A. Some of it was; I do not know whether all of it was or not.

RE-DIRECT EXAMINATION.

We furnished the sand and gravel that went into the sidewalks and curbing on East B street that Rector and Daly put there. I should judge we furnished between \$2,000.00 and \$3,000.00 worth;

about \$2,500.00 worth, I should judge. We have not been paid for all that sand and gravel. I do not know to a dollar how much is due and owing us. I could not tell how much was owing us for the sand and gravel that went on the improvement of East B street. The balance still due us for the sand and gravel that we furnished these people is between \$500.00 and \$600.00.

RE-CROSS EXAMINATION.

Q. When you commenced furnishing sand and gravel, so far as this action is concerned—there was a balance due June 28th of \$615.10; is that right?

A. I guess so.

Q. You have been paid for that, have you not? This statement shows a balance due on June 28th of \$615.10. Now, you have been paid for that?

A. I do not know; we have been paid for sand and gravel—(interrupted)

Q. After that sand and gravel was paid for, there was still \$662.50 taken off the rock account?

A. Up until June, yes, sir; up to that time.

MR. GILTNER: That was credited on the rock account?

MR. MILLER: Yes.

Q. After you settled your sand and gravel account in full, then you credited one check on the crushed rock account?

A. Yes, sir.

Q. So, you have been paid in full for your sand and gravel?

A. Yes, paid in full up until somewhere, along,

I think—I think we were paid in full by Rector & Daly for everything that they owed us up until June 31st.

Q. And then the balance of that is what is in this account?

A. The balance is what he got from us since then.

Q. And there was none of that that went on East B street?

A. Of the sand and gravel?

Q. Yes.

A. I do not know.

Q. Because the sidewalks were built long before that?

A. They might have been.

RE-DIRECT EXAMINATION.

Q. It is not the sand and gravel that goes in there for the street itself?

A. No, sir; there might have been some of what we call “muck” sand; I do not know where that went to.

MR. GILTNER: I desire to offer in evidence at this time a certified copy of the notice to the City Clerk of the City of Vancouver, Washington, already referred to in the evidence.

MR. MILLER: I wish to make a formal objection. The point was argued in the demurrer, and it was overruled after being argued, and I do not know whether it has much merit or not, but it is worthy of consideration. The provisions of the statute governing actions brought upon liens re-

quires a case to be brought, to be commenced, within eight months, and, reasoning by analogy, this being in the nature of an action to recover for materials furnished, they should have commenced within eight months after the materials were furnished and after the notice was filed with the city clerk. It is incompetent and immaterial.

Objection overruled. Exception allowed.

WHEREUPON, Said document is admitted in evidence, and marked "Plaintiff's Exhibit A."

Plaintiff offers in evidence the certified copy of the original ordinance, which was admitted in evidence, and marked "Plaintiff's Exhibit B."

John J. Caspary, called as a witness, in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

On or about and prior to June 25, 1911, I was bookkeeper for the plaintiff, and am bookkeeper for the plaintiff. My duties are such duties as come under the general work of an ordinary bookkeeper of any establishment; that is, to keep track of the sales, receipts and disbursements, and to make proper charges, to keep track of the expense accounts; in other words, to keep the details of the business as closely as possible. To credit receipts and payments allowed; they pass through my hands.

Q. I will ask you if you were familiar with the accounts of Rector & Daly with the Columbia Digger Company? That is, up to about the 25th day of June, 1911, for sand and gravel and rock

furnished them on account of the Fourth Plains contract, and other contracts, especially the B street contract, in the City of Vancouver, Washington.

A. A bookkeeper, in his ordinary course of business, has got so many of those little things to look after that it is pretty hard, after two years to say how it stood exactly. I can remember approximately how it stood at that time.

Witness shown account on bill head of plaintiff and asked what the figures thereon are and who made them, and in answering testified as follows:

Page one, Exhibit A, is a statement made by myself, from the books of accounts of Rector & Daly, showing the number of yards of rock furnished on B street, Vancouver, Washington, and the credits given thereon. This is a correct statement of the standing of rock, and payments made on rock deliveries, particularly at the present time, and at that date also. I know what the balance of \$615.10 on June 28th represents. It consisted of \$12.50 for crushed rock, and the balance for sand and gravel.

MR. MILLER: If the witness knows nothing about that except as it appears from the books, then I object, because the books would be the only competent evidence.

MR. GILTNER: We will find out whether he knows.

THE COURT: He may only answer if he knows.

Q. Do you know what that was for?

A. What was the balance itself for?

Q. Yes.

A. That balance consisted of \$12.50 for crushed rock, and the balance for sand and gravel.

Q. What for? Furnished where?

A. That crushed rock was furnished prior to any contract, or prior to any delivery on B street, and it was bought by Rector & Daly for Fourth Plains. The sand and gravel, why they bought just for their ordinary purposes or carrying on, or acting as dealers in sand and gravel. The item dated June 29, 1911, \$244.80, represents a charge for 408 yards of sand furnished to Rector & Daly. The next item dated July 8th, \$321.60, represents a charge for 402 yards of gravel. The next item, July 8th, 352 yards of gravel, amounting to \$281.60. July 9th represents a charge for 337 yards of gravel, amounting to \$202.20. July 9th represents a charge of 350 yards of sand and 410 yards of gravel, amounting to \$538.00. July 11th represents a charge for freight paid, transferring asphalt from Portland to Vancouver. The item is \$379.65. July 11th represents a charge of 422 yards of sand, amounting to \$211.00. July 17th represents a charge of 627 yards of gravel, amounting to \$501.60. July 18th represents a charge for 1105 yards of sand, amounting to \$552.50. July 30th represents a charge for 355 yards of gravel, amounting to \$284.00. August 10th represents a charge for 353 yards of gravel, amounting to

\$282.40. August 11th represents a charge for 379 yards of sand, amounting to \$189.50. August 16th represents a charge for 341 yards of gravel, amounting to \$272.80. August 17 represents a charge for 428 yards of sand, amounting to \$214. August 19th represents a charge for 347 yards of gravel, amounting to \$277.60. August 27th represents a charge for 337 yards of gravel, amounting to \$269.60. August 29th represents a charge for 372 yards of sand, amounting to \$186.00. August 31st represents a charge for 428 yards of sand and 323 yards of gravel, amounting to \$472.40. September 6th represents a charge for 403 yards of gravel, amounting to \$322.40. September 10th represents a charge for 299 yards of gravel, amounting to \$299.00. September 12th is a book charge of a protested check; the check was never paid. It was for \$2,500.00, and a protest charge of \$3.00, making a total charge of \$2,503.00. Plaintiff paid the protest charges. I did not receive the money on the check for \$2,500; it was protested. Next item, September 20th, is 313 yards of sand, amounting to \$250.40. September 21st represents a charge for 200 yards of gravel, amounting to \$200.00. September 27th represents a charge for 331 yards of gravel, amounting to \$264.80. October 2nd represents a charge for 360 yards of sand, amounting to \$180.00.

These items were for the months that occurred in the year 1911. These total charges, including the balances, amount to \$10,375.95. Deducting

\$2,503.00 leaves a difference of \$7,812.95. That represents the total charges for sand and gravel and freight made against Rector & Daly between June 28, 1911, up to and including October 28, 1911.

Q. Look at the items on Exhibit A, which has been marked for identification, and give the dates, and what those items are and what they are for.

Counsel for the defendants objected to the witness using the exhibit mentioned for the reason that the original books were not offered in evidence and the witness was using a purported copy of the bill of particulars furnished to the defendants, and the objection was overruled for the present.

A. Exhibit A represents charges made all for crushed rock furnished to Rector & Daly for the improvement of B street, at Vancouver, Washington, under the following dates: June 25th, 530 yards of crushed rock, \$662.50; July 5th, 573 yards of crushed rock, \$1,216.25. The next is August 1st, 478.7 yards of crushed rock, amounting to \$598.38; August 10th, 401 yards of crushed rock, amounting to \$501.25; August 22nd, 380 yards of crushed rock, amounting to \$475.00; August 23d, 445.6 yards of crushed rock, amounting to \$557.00; August 29th, 336 yards of crushed rock, amounting to \$420.00; September 2d, 384 yards of crushed rock, amounting to \$480.00; September 4th, 370 yards of crushed rock, \$462.50; September 24th, 401.4 yards of crushed rock, amounting to \$501.75; September 26th, 402 yards of crushed rock, amounting to \$502.50;

September 27th, 380.2 yards of crushed rock, \$475.-25; total, 5,481.9 yards, amounting to \$6,852.38. Under date of June 29th, 1911, we credit that account with discount, \$13.25, and by check, \$649.25.

That was a total credit of \$662.50, under date of June 29th, leaving a balance of \$61,189.88. Rector & Daly gave us on June 29 a check for \$649.25 in payment of a barge of rock that went on B street. There was a discount of 2 per cent, \$13.25, making the net amount of the check \$649.25. Total credit we give on B street, \$662.50.

Q. What account was that?

A. It was a check that we received July 15th, amounting to \$859.90. Up to July 1st, or June 30th, according to the figures shown on Exhibit B; that takes up the balance of \$615.10, and the first charge following thereafter of \$244.80, those two items amounting to \$859.90. Those two items are the first two items on Exhibit B. The check, defendants' Exhibit 4, paid the Rector & Daly account up in full to June 30th or July 1st, whichever way you want to consider it. \$12.50 for rock and the balance on sand and gravel, but I would not say positively that the rock went on Fourth Plains; the rock was bought for that purpose.

THE COURT: Was this payment made by the books?

A. Yes.

MR. MILLER: Then, the books would be the best evidence.

MR. GILTNER: I will produce the books if he insists upon it.

MR. MILLER: I am not insisting upon it.

THE WITNESS: This check was sent to us to cover a statement sent to Rector & Daly showing that balance. This statement was made up from the books. Exhibit C on the bill head of the Columbia Digger Company is also a statement made up by myself, showing the payments made by Rector & Daly, and also their credits allowed them. I made those figures; I took them from the books of the company; they are a correct representation of such books.

Q. I wish you would, item by item, state what the payments were, when they were made, and what they were for, as shown by the books, as the court has stated?

A. Check dated July 12th, \$300, was a check Rector & Daly to cover freight paid by the Columbia Digger Company on asphalt, which asphalt was delivered at Portland. That was the freight charge, not made by ourselves, but by the transportation company for bringing the asphalt to Portland, and we paid the freight to accommodate Rector & Daly, and they sent us their check in return. The next check is a credit on July 15th, \$859.90. As I said before, that item balances their account up to June 30th. The next item is under date of August 3d, amounting to \$1,216.25.

Q. Explain that; it has marked on it, "Crushed

Rock." What do you know about that check, and what was done?

A. When I noticed that check, I saw that it was marked "Crushed Rock," so I called Captain Hackett's attention to it, and I told him—(interrupted)

MR. MILLER: We object to that.

Q. You cannot tell that, unless Rector & Daly were present and knew about it, but afterwards, did you ever have Rector & Daly ratify what you are saying now? Have you ever talked any with Rector & Daly?

A. No, sir.

Q. Have you ever had any conversation with Rector & Daly, or anyone, regarding that check since, as to the reason as to why it was not put onto crushed rock?

A. I have since, yes, sir.

Q. Then, you can testify to it.

THE COURT: A conversation with Rector & Daly since?

A. I have spoken with Mr. Rector about it.

MR. MILLER: Recently, the last few days?

A. No, sir; at that time; Mr. Rector at that time used to come into the office every once in a while.

MR. GILTNER: I think that is competent.

Q. State, and explain that check and the circumstances of the check, and the item marked "Crushed Rock" on it, and everything about it, to the judge.

A. When I noticed that the check was marked

“Crushed Rock”, I called Mr. Hackett’s attention to it, and also the fact that Rector & Daly at that time owed us for sand and gravel delivered during the month of June, which amounted to something like \$2,800, and that this sand and gravel had not yet been paid for, and if we were to accept this check which was marked “Crushed Rock,” we would be exacting payment for something which we agreed to wait for, and at the same time give an extension to Rector & Daly of time on their sand and gravel, which they promised to pay cash for and on which they were \$2,800 behind. I did not hear the telephone conversation or communication which Captain Hackett had, but the check was later on turned back to me with instructions from Captain Hackett to credit it to sand and gravel. Later on I understood from Mr. Rector that that was the arrangement made with him, and that it was satisfactory to him.

The next item represents a rebate of \$40.80. I do not recall just now what that is for. It is a credit to Rector & Daly; it is an allowance that we made to them for some overcharge or something. I could not say positively what it is for. The next item is a credit on August 28th, a check amounting to \$3,000. It is defendants’ Exhibit 6. It is quite evident that it was a post-dated check. I have the credit under date of August 28th, the date we received it; it was post-dated; we received it on August 28th, and the receipt is dated September 26th.

Q. State what it was for?

A. Well, there was no application of the check made, that is, on the check itself, and, according to the agreement with Rector & Daly, we applied it to the credit of sand and gravel, in view of the fact that there was still owing us, even at that time, quite an amount on sand and gravel. As a matter of fact, Rector & Daly have not yet paid their sand and gravel in full. They always did owe us a big balance.

Q. The next item?

A. The next item, pencilled across, refers to a credit for \$2,500, a check also post-dated, a check which has never been paid.

MR. MILLER: That \$2,500 may as well be marked off; it cuts no figure.

THE WITNESS: That may be true, but in making this statement, when we received the check, we had to give credit for it. When we put it through the bank, the bank had to give us credit for it, and for our record, we had to put it on the statement. The next item is a discount of \$5.00 which we allowed when Rector & Daly gave us a check for \$250.00 under date of September 27th. The next item is a check for \$176.40, on which we gave Rector & Daly a credit of \$3.60 for discount. The next item is a check for \$1,000 on the old sand and gravel account. The check dated October 10, 1911, defendants' Exhibit No. 2, is this check for \$1,000. The check is dated October 10th, for \$1,000. I received it and credited it to the sand and gravel account, because there were no further instruc-

tions given to me, and I credited it according to the agreement, and because Rector & Daly still owed us a heavy balance on sand and gravel.

The next item is a credit of \$450.00. By check \$450.00; but that check is not a Rector & Daly check. That check was given to the Columbia Digger Company by the Warren Construction Company, to protect an order on them by Rector & Daly. It seems that Rector & Daly had some money coming from them, and we wanted to get money from them on their sand and gravel account, and they gave us an order on the Warren Construction Company, and this check was the payment of the order, and then there was a small balance of ten dollars and something, which Mr. Rector deducted on one or two occasions, in view of the fact that when we took the asphalt over, we lost two barrels of asphalt, and they practically offset each other, and I closed it up. Those total credits amount to \$9,812.16.

The total charges for sand and gravel and freight, including that protested check, amount to \$10,315.95. Those total charges, by the way, are marked Exhibit B, and those total credits I have just read off, and which are marked as Exhibit C, including the protested check, amount to \$9,812.15. The difference I think you will find is \$503.80. That represents the amount Rector & Daly still owe the plaintiff for sand and gravel; they have not paid that. They have not paid what they owe on B street for crushed rock that was furnished them.

Q. I hold here in my hand defendants' Exhibit

5, a check dated Vancouver, Washington, July 5, 1911, for \$1,017.49, and on the left-hand corner of it is marked "Yards of rock." I wish you would explain to the judge what that check was given for?

A. That is a post-dated check. It was received in the latter part of June, I think June 27th or 28th, and it is in payment of two barges of rock furnished for Fourth Plains, and from that he has taken a discount, I forget just the amount. That does not show on here, because—these exhibits were made at the request of the attorneys for the defense, and only call for statements of the business transacted between the time of work done on B street. Now, this rock was furnished before B street rock, and the check was received before our records at least show any transactions on B street, and for that reason this check is not shown on these credits, but the check itself was received by the Columbia Digger Company, and applied to the credit of crushed rock furnished for Fourth Plains. I hand you now defendants' exhibit 7, a check dated Vancouver, Washington, June 23, 1911, for \$501.64, and on the left-hand corner in ink is "crushed rock." I wish you would state to the court what that was for?

A. That check was the same proposition as the one just read off.

THE COURT: What was the amount of that?

A. \$501.64. That was for rock furnished for Fourth Plains, and this check is in payment of that

rock, and they got due credit for it on the books of the Columbia Digger Company.

Q. I will ask you now if everything supplied by the Columbia Digger Company to Rector & Daly were paid in full up to July 1, 1911?

A. Rector & Daly had paid—these accounts are all since July 1st. This check which we received under date of July 15th, balanced Rector & Daly's account in full up to July 1st.

CROSS EXAMINATION.

So, everything that Rector & Daly owed us was satisfied up to July 1st. We were furnishing them some rock in June. I don't remember the exact date now we commenced in June, but I think about June 15th. We did not commence furnishing them rock for B street about June 15th; I think under date of June 29th we furnished them a barge of rock on B street. That is the barge for which we admit payment. The barge was placed on June 25th, and the payment was made on June 29th. The first check we received for crushed rock on B street was July 10th. That is the first check we received applying on B street.

This check is dated July 10th.

Q. But you got it on June 29th, did you?

A. Well, I would have to see from those statements, but I think that is right. Rector & Daly frequently gave us post-dated checks. By calling off the date of the check, I could not state positively that we received it on that date. We could not present it until they had money in the bank to take it

up. No bank will honor a check post-dated until the date of payment arrives.

Q. And you had to wait until they got the estimate on B street before they would take this up?

A. I do not know anything about the estimate on B street. My record will show whether this check was post-dated or not. I think it will show on there, because whenever we received a check that showed in our records that it was received on that date, regardless of when it was post-dated. Aside from my records, I remember that that check was post-dated. It was received toward the latter part of June 29th; I remember that independent of my records. I remember distinctly now, because I just happened to see those—. On June 29th Rector & Daly owed us \$615.10, balance on sand and gravel.

Q. Why did you not credit this check on sand and gravel on that particular date?

A. Well, while the sand and gravel was still on terms of cash, still the Columbia Digger Company had never been so exacting as to demand spot cash on everything, so long as the person paid the account on or about the 5th or 10th of the month. It was satisfactory—Rector & Daly at that time did not owe such a very great amount of money. They only owed about eight hundred and seventy dollars, I think—no; eight hundred and some forty dollars, on sand and gravel, and when that check came in marked "Rock" they did not object to receiving it on rock, because they expected Rector & Daly would

keep their rock and send the payment of the balance on sand and gravel in a few days, which they actually did.

We had an agreement that the sand and gravel would be paid first. When we received this check for \$662.50 we applied that on the rock account.

Q. But, at that time, there was more than the amount of this check due you on the sand account? That is true, is it not?

A. I want to make a distinction; there is a difference between "owing" and "due." You might owe a bill, and at the same time the bill is not due.

Q. All right; the sand and gravel account was both owing and due when it was furnished?

A. No, sir; the company has never taken the stand that the bill for sand and gravel becomes due the actual day it is delivered.

Q. When is it due?

A. Generally figure payment on or before the 10th, is the way ordinarily of figuring; that is the way we are transacting business, even at the present time.

Q. When you got this check of August 8th for \$1,216.00, marked "Yards of rock," you did not apply that on the rock account, but applied that on the same—on the sand account?

A. Yes; that is because they owed such a large amount, and it had already passed that certain time, certain date of ten—or tenth—(interrupted)

Q. It had not yet passed the 10th of August, had it?

A. No, sir; but that was due in July; they were owing \$2,800 for sand and gravel delivered in June which should have been paid in July. We received \$859.50—.90 (?), which paid their account up to June 30th. That \$2,800 they owed for sand and gravel delivered in July.

On July 15th we got a check for \$859.90, which squared up the June account. You are firing so many dates, I am getting mixed up. That check for \$859.50 was received about July 15th and paid their June account in full.

Q. Have you not already stated that on the 1st of July, on the 28th of June, 1911, they owed you a balance of \$615.10?

A. Well, there is another figure with that, and that is what was taken care of with that check for \$859.00.

Q. There is your statement (indicating). There was a balance of \$615.10 due on June 28th?

A. Yes, sir. That is all they owed us on June 28th.

Q. Those items were not included in this statement?

A. In which account?

Q. In this account that makes up this check for \$859?

A. They are on that statement.

Q. Where are they?

A. This balance of \$615.10, together with this charge of June 29th of \$244.80, amounts to \$859.90, which were paid by check received by us on July

15th for sand and gravel and rock account balance on July 1st.

Check for \$662.50 paid for the crushed rock up until July 1st, and the check of July 17, 1911, paid for all of the sand and gravel up to July 1st, so that Rector & Daly really owed nothing except what was bought or delivered to them after July 1st. Everything was squared up to that date, and all payments received after that time are for material furnished after that date. When we received this \$1,216.00 check, we applied that on the sand and gravel account. They owed us at that time about \$2,800.00 on sand and gravel, and owed us \$1,216.00 for crushed rock. At the time this second check was given, they owed us for two barges. That check corresponds exactly to the two barges of rock. They amounted to 973 yards, or \$1,216.00 in money. It probably was the intention of Rector & Daly in making that check to give it in payment for these two barges of rock. It corresponds in amount, too. We applied it to our sand and gravel account by instructions, and according to the agreement between Captain Hackett and Mr. Rector.

Q. And you did likewise with those other checks, one for three thousand dollars?

A. My understanding is that the company has a right to—(interrupted)

Q. That is a question of law for the Court to decide. That is what you did do; you applied all of them to the sand and gravel account, regardless of where they came from?

A. Yes, because there was no application made by the payer.

Q. The main reason was because you had security on B street, and not security on the other items?

A. Not as I know of.

I made up this statement that went to the City Council as to the amount due for crushed rock.

Q. How did you come to make this \$8,415 due for crushed rock?

A. Why, I omitted to give Rector & Daly or B street proper credit for the check for \$649.25. We made that correction; that is why we are now claiming less. Just a second; I will explain that.

Q. All right.

A. I had credited them this payment of \$649.25 and discount of \$13.25 to sand and gravel in error, when I drew up this statement. That overpaid Rector & Daly's sand and gravel account \$158.70. When we gave them credit for the difference there, that accounts for the \$503.00 which Rector & Daly still owe on the sand and gravel. You see, the \$662.50—from that, if you will deduct \$158.70, which is the credit they got by overpayment on sand and gravel, leaves a balance of \$503.80, and brings the amount we are claiming down to \$6,189.88.

Q. You have not yet explained how this came to be \$8,415.00.

A. May I have that (indicating paper) a moment, please?

Q. Yes. (Counsel hands paper to witness).

A. We probably—I am pretty sure it does include the rock furnished on Fourth Plains.

Q. But it is a notice to the city of the rock furnished on B street?

A. Yes, sir.

Q. And in that you are claiming that you furnished eight thousand dollars—(interrupted)

A. Well, I admit error in making the statement read that much; that included the rock furnished on Fourth Plains.

Q. I show you another paper (handing paper to witness). Did you make that out?

A. That is what I was explaining just now. That is \$158.70; I credited them \$662.50, sand and gravel, and if I did that it would overpay sand and gravel \$158.70, so I have not credited them with \$158.70 here. In going over the account, I found my mistake, and, therefore, gave you credit for the correct amount, \$662.50; the difference is \$503.80, which Rector & Daly still owe on sand and gravel.

Q. As a matter of fact, you did not credit them \$662.50 until after this suit?

A. In segregating it, and drawing off this statement, I credited them with sand and gravel instead of crushed rock.

Q. And it so appears on your books, \$662.50 credited to sand and gravel, on your books?

A. It was credited to the account of Rector & Daly and it was marked "rock," but in drawing off the statement, I credited sand and gravel to rock account.

Q. When you found out that you were getting a little too much money and it overpaid sand and gravel, you later on twisted it around, and now he gets credit for it?

A. That was done, all right, but not because we were getting too much money, because we would like very much to get the rest of the money. We are giving Rector & Daly and Sparks & Blurock credit when we think they are entitled to it.

Q. At the time this \$662.00 came in, you did not credit it on the rock account?

A. I posted it to the credit of Rector & Daly, the way they keep their accounts.

Q. That is exactly the truth about it; you credited all of these checks to the account of Rector & Daly, without especially applying them to any account?

A. No, sir; the checks marked rock, I marked rock in the ledger accounts.

Q. You did not bring the ledger with you?

A. No, sir.

I made this out on December 30th as the correct crushed rock account. I admit that I made an error in not crediting you with the \$662.50, and in our claim we are now allowing this \$662.50 on B street. In this account we are giving you credit for \$158.70.

RE-DIRECT EXAMINATION.

Q. Did you make an error on the books, or in taking off the statement from the books?

A. Taking off the statement from the books.

Rector & Daly show these credits or checks, and they are marked whether they are to be applied on rock or not.

Q. Did you mark any rock?

A. Yes; that check for \$501 is marked rock, and the check for \$1,016 is marked rock, and the check for \$859.90 is marked rock, and the \$12.50 is marked rock, and the check for \$649.25 is marked rock.

Q. Why didn't you bring that book here to show that?

A. We were not required to and the attorney did not say it was necessary.

Q. When you were taking that rock account, why did you not put that on this bill?

A. I admitted it was an oversight, an error on my part.

Q. You took that from the ledger marked rock, and posted—placed it on the same—on the sand and gravel account?

A. Yes; that is the error I made; yes, sir.

A. B. RECTOR, called as a witness on behalf of the PLAINTIFF, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I was a member of the firm of Rector & Daly, one of the defendants in this case. Our firm had business relations with plaintiff in regard to furnishing crushed rock on the B street improvement in Vancouver, Washington. They furnished us for that improvement about 5,440 yards, something like

that; it might have been 81 yards, I am not sure. We were to pay \$1.25 a cubic yard at the dock. We have never paid for that crushed rock. It went on the B street improvement, that amount of rock.

Q. You have a credit of six hundred and sixty-two dollars and fifty cents on that account. Do you know that?

A. Well, I do not know; I would have to refresh my recollection from a check or something of that kind with regard to that. I have no books.

Q. Do you know how much Rector & Daly owe them on the crushed rock furnished on B street?

A. Sixty-one hundred and eighty-nine dollars and something; it is so claimed by them.

I think the last crushed rock was delivered to us on B etreet sometime in September or October; the latter part of September or the first of October. I think it was about September 27th; that is my recollection. I would not be sure of it. I would not be sure of the exact date.

CROSS EXAMINATION.

Q. Did you pay them one thousand dollars for the last barge of rock that came?

A. Well, I am not sure in regard to that. I do not think I drew that check; I do not think that I ever saw that check, personally, myself. I can tell if I see the check.

Q. Is it not true that there was a barge of rock at the dock to unload which the company refused to unload until they got a thousand-dollar payment?

A. I do not remember that.

Q. And for him to go to the bank and get a thousand dollars and pay them?

A. My recollection of that transaction is that I called up Mr. Daly, and called Mr. Bouten, the president of the bank. I wanted some money. The Columbia Digger Company refused to deliver any more rock until we paid up our sand and gravel account. That is my recollection of it.

I remember testifying in a case at Vancouver where Sparks & Blurock sued the Vancouver Trust & Savings Bank.

Q. And in that case did you not testify as follows: "Can you tell from your books what became of the money?"

A. It was used for various purposes, paying the help and labor.

Q. Can you tell from your books where it went?

A. No, sir.

Q. Can't tell anything about, can you?

A. No, sir.

Q. Do you know if any of the portion of the bonds you received from East B street went to the Columbia Digger Company?

A. I think one thousand dollars went to the Columbia Digger Company.

Q. Credited on its account?

A. I think so.

Q. That is all they ever got out of the East B street improvement?

A. I think so.

Q. What do you base that on?

A. For the reason that we borrowed one thousand dollars to pay the Columbia Digger Company, the last we borrowed from the Vancouver Trust & Savings Bank; Mr. Daly borrowed that."

Q. That is true, is it not?

A. If I testified to it, it is.

Q. So this last one thousand dollars was borrowed at the bank to pay for a barge of rock, which they refused to unload until they got the one thousand dollars?

A. I cannot testify that they refused to unload it.

Q. Well, you could not go on with the improvement, and did you not tell Mr. Bouten that you could not go on with the improvement on that street unless you got a thousand dollars to pay for this barge of rock?

A. I told Mr. Bouten that we would not go on with the improvement of that street; that we would have to give up that street, and turn it over to the bondsmen, unless we could get more money than we were getting for our improvement. That is my recollection.

Q. Didn't you tell him that you had to have this thousand dollars?

A. Yes; I think I did.

Q. To pay for this barge of rock?

A. Well, I wouldn't say it was rock.

Q. You were not getting any sand and gravel at that time?

A. I think we were supplying Elwood Wilds.

Q. You did not need any sand and gravel to complete East B street at that time?

A. When was that?

Q. October 10th.

A. I think that at the time the sidewalks and curbs were all in.

Q. Here is some more of your testimony:

“Q. Any data that you have, or any books from which you can refresh your recollection to tell whether the Columbia Digger Company received anything less than one thousand dollars?

A. They received money for sand and gravel, but none for rock, with the exception of that thousand dollars.”

Q. That is what you testified to?

A. My testimony would be fresher in my mind at that time than it is at the present time.

Q. And if you so testified at that time, that is true?

A. I think it is.

Q. Don't you think you did so testify, Mr. Rector?

A. Well, if it is there on the records, I must have.

Q. Well, it is.

Q. For fear counsel may object to my asking this question—I will ask you this, Mr. Rector, if on the 10th day of October, 1911, you did not telephone to Mr. Daly in Vancouver, you being in Mr. Hackett's office, that is, the office of the plaintiff here, in Portland, Oregon—I do not know whether

he was in the office with you or not—if you did not telephone to Mr. Daly that the plaintiff would not unload this barge of rock which they had at the wharf, unless he would get a thousand dollars for it, and if Mr. Daly did not a little while later 'phone you that he had arranged for the thousand dollars?

A. Well, I do not remember. I do not think it was. I think I brought this question up with Mr. Daly in Vancouver in the evening; that is my recollection.

Q. You will not say that you did not 'phone to Mr. Daly?

A. No, sir; I will not say that I did not; I might have.

Q. Now, you say that they have not been paid for the rock which you got on—(interrupted)

A. They claim not.

Q. I am not asking you what they claim.

A. I know Rector & Daly did not pay for it. I do not know whether the bondsmen paid for it or not, out of the money that was left from it.

Q. Did not Rector & Daly pay for the crushed rock that went on that street?

A. I do not think so.

Q. Did not Rector & Daly have an arrangement with the Vancouver Trust & Savings Bank to get the money that went to pay for this rock?

A. Our arrangement was with the bank that we would see—that we would sell all of our bonds to the bank on B street and Connecticut—

That is my signature to defendants' Exhibit 8.

Whereupon defendants offered in evidence Exhibit 8.

MR. GILTNER: I object to the introduction of this in evidence, because it states in here that they have entered into a contract—well, the Court can read it. It is not the contract. It is a notice to the city, but it speaks of a contract, and the contract is the best evidence, and therefore I object to it.

Q. There was no other contract between you and Mr. Bouten than this?

A. I think not; I do not believe that there was.

Q. This is all the written contract you had?

A. Yes, but we had verbal agreements back and forth.

MR. GILTNER: Any notes, or anything of that sort?

A. Yes; notes every time we went in there and got money.

MR. GILTNER: I object to it as not the best evidence.

THE COURT: Objection overruled. Exception allowed.

WHEREUPON said paper is admitted in evidence, and marked Defendants' Exhibit No. 8.

Q. You had an understanding with Mr. Bouten that you were to turn over the bonds you got off the improvement of B street to Mr. Bouten, and he would advance money to you from time to time, based upon the estimates on that street. That is right, is it not?

A. Well, we had an arrangement that all of our moneys went in there.

Q. I understand, but so far as B street was concerned?

A. Yes, they were to handle the bonds at eighty-seven cents.

They handled the bonds on B street, Connecticut avenue and on Fourth Plains; I am very sure of that; the same notice to the city on all of those streets. I do not know that Connecticut went to Mr. Wentworth. I might have so testified at the time of the trial of this case in Vancouver, but I have forgotten my testimony in regard to that. I do not think that they all went to Wentworth, but we did have that arrangement with Mr. Bouten and the Vancouver Trust & Savings Bank.

Q. And you were getting and did get estimates on this street every two or three weeks?

A. Well, Mr. Bouten got them.

Q. Did you know of your own knowledge that he got them?

A. I know that when we were overdrawn, or something like that, he would get Mr. Lotter to give him an estimate.

MR. GILTNER: Were you with him?

A. No, sir.

MR. GILTNER: Then I move to strike that out.

THE COURT: Motion granted.

Q. You drew money from time to time from Mr. Bouten, based upon the improvement of B street?

A. Our moneys was all in there. We put through the Vancouver Trust & Savings Bank from the first day of April over seventy thousand dollars; that was moneys that came from the pipe line, some of it, money that came from the sale of sand and gravel, from B street, and \$4,000 came from the grading of what is commonly known as the old race track, forty-five hundred; I think it all went through there. All of that went through during July, August and September. The last payment, I think, was made in July.

Q. Is it not true, Mr. Rector, that the only money you put into the Vancouver Trust & Savings Bank during July, August and September was a small amount which you received from Elwood Wilds, other than what came from B street?

A. I think that the records will show we put through that bank from Elwood Wilds and the Barber Asphalt Company something like ten thousand dollars.

Q. Now, you say that they have not been paid anything on crushed rock. You, or the bank for you, received a large sum of money from B street during the time that this work was going on, didn't you?

A. Yes, sir.

Q. Amounting to twenty-three or twenty-four thousand dollars?

A. Twenty-five thousand dollars, I think, approximately.

I do not remember giving a check for \$3,000.00.

If I drew the check I could identify it. (Witness here shown the check). Well, I signed that check; I must have given it; my signature is there; I do not remember. (Witness shown note dated September 7th for \$4,000.00). I signed that note.

Q. Now, that note, Mr. Rector, was given to the bank because there was no money in the bank to take up this three-thousand-dollar check. Is not that so?

A. Well, I do not recall.

Q. And this note was based upon a B street estimate?

A. Well, I could not say.

Q. You do not know?

A. No, sir; because our notes we gave back and forth—our notes were jerrymanded around there so we did not know—we did not have any separate B street fund.

At the time we gave the \$3,000.00 check we did not have money enough in the bank to cover it.

Q. And after it was marked "Rejected," do you remember going into the bank and giving this four-thousand-dollar note the next morning or the same evening?

A. It could not have been the same evening.

Q. The next evening?

A. No, sir; that check is dated September 6th, and sent to the Columbia Digger Company.

Q. It was marked "Rejected?"

A. But it could not have gotten back there on the 7th, for the simple reason that the Columbia

Digger Company could not get it until the 6th, and it went through the First National Bank.

Q. It did not go through the bank?

A. Yes.

Q. Didn't they reject it?

A. Well, the First National Bank of Portland, I think, rejected it, so that note might or might not have covered that check.

Q. Do you know what date it is marked paid?

A. I could not say that.

Q. It is marked paid September 7th?

MR. GILTNER: Yes, it is marked paid September 7th.

Q. You said it was turned down; what indicated that?

A. I say it is marked across the face "Insufficient funds," right there (indicating). We did not have sufficient money to take it up, or it would not have been turned down. I could not say whether we had any money there at all. If you have my bank book there I can tell you.

Q. And you gave this note for four thousand dollars, and that note was given against the B street improvement, or fund?

A. I do not know whether it was or not.

Q. Mr. Bouten would not trust you on anything else?

A. Well, we turned in money every day.

Q. But, every note you gave to Mr. Bouten during this time was given against the B street fund?

A. I do not know anything about that; I do not know what he applied on it.

Q. But you do know that at the time this four-thousand-dollar note was given, that is, the note signed by you, and given to the bank and the money advanced, based upon the B street estimates?

A. I cannot swear to that.

Q. You would not swear it is not so?

A. No, sir; I would not swear it is not so, and I cannot say it is so; we borrowed money there even to pay other indebtedness from Mr. Bouten that had been running against Rector & Daly for six or seven months prior to that time.

Q. Did you borrow any money at that time?

A. On that particular date?

Q. Yes.

A. I do not know—we borrowed five or six hundred dollars for a donkey engine and gave a note for it.

Q. When?

A. Along in September or the fore part of August; somewhere along there; I cannot say exactly. We borrowed money there for no particular purpose.

Q. Is it not true that Mr. Bouten and Mr. Evans absolutely refused to lend you any money except upon B street estimates?

A. If I remember right, I never talked with Mr. Evans regarding funds whatever; I done all my business with Mr. Bouten.

Q. At this time, this particular time, you were

not borrowing money to pay for something else, because there was none of your money in the bank at the time the four-thousand-dollar note was given?

A. There was not enough money to pay for that particular check, or the check would not have been turned down. It might have been to pay labor; we borrowed money to pay labor.

MR. GILTNER: Would you give notes for it?

A. We gave a note for everything we borrowed there, I think, or gave a check on Hartman & Thompson.

Q. Here is a check for \$1,126.00; what is the date of that?

A. (Examining check) August 8th.

Q. At the time that was given, that was given in payment for rock, wasn't it, that went on B street?

A. August 8th?

Q. Doesn't it say so down on the corner?

A. I cannot see that from where I stand. This is my writing. At the time I wrote my signature on there I did not write those figures in the left-hand corner; our bookkeeper did; he filled out the check before I signed it.

Q. Now, at that time you were in the red some four or five thousand dollars and didn't have a cent in the bank?

A. I do not know what our statements showed.

Q. And then you gave a note, didn't you, against the B street assessment to pay for this \$1,216.00?

A. My recollection is that there was never no notes; if there was ever any notes given to the bank

by Rector & Daly marked B street notes, I would like to see them, and if they were marked, they were marked after I signed them against any one improvement; that is my recollection.

Q. The fact of the matter is that these payments were made along from time to time by you to the Digger Company from money which came from the Vancouver Trust & Savings Bank?

A. And other banks.

Q. I mean as far as these checks are concerned, of which we have been talking today; they all came from the, or through the Vancouver Trust & Savings Bank?

MR. GILTNER: The checks show for themselves.

A.—Yes; the checks show for themselves, and our money did not all come from Vancouver that paid all of our checks.

Q. I say, didn't you have an understanding, and didn't you tell me, and didn't you testify to it in court, that you had an understanding, and an agreement with the plaintiff, some one of them, the officers representing the plaintiff corporation, that the money which came off of B street should be applied by them on unsecured accounts, on the sand and gravel, or anything else that you owed them for, and because you had security for the material on B street.

A. I will answer that question by saying that I do not think I did.

I testified in court at the time of the trial of

Sparks & Blurock and the Vancouver Trust & Savings Bank in the superior court at Vancouver, Washington.

(Counsel for defendants read):

“Q. Did you have an arrangement with the Columbia Digger Company that you should do that and let the crushed rock account stand because you had a bond to protect you?

A. I think probably we did.”

Q. Let us go back a little on this:

“Q. And you drew checks from the Vancouver Trust & Savings Bank to pay for sand and gravel on other streets?

A. I think so.

Q. Because you got a discount, and let your crushed rock account on B street go?

A. We might have.

Q. Did you?

A. We did not have any B street account.”

Q. Now, I will ask if you did not testify as follows in that case:

“A. The engineer might have given us an estimate but no bonds drawn until along in July or August.

Q. But you got some cash payments in the meantime?”

MR. GILTNER: I will agree that counsel may put that all in evidence—(interrupted)

MR. MILLER: I am simply asking this man if he did not testify to this.

THE COURT: Proceed.

“A. Not on East B street.

Q. Sure of that?

A. Not to my knowledge.

Q. When did you make this arrangement with the Columbia Digger Company that the cash should go on the sand and gravel and the bondsmen stand for the crushed rock?

A. May or June, 1911.

Q. And at that time you did consult Sparks & Blurock?

A. I did not.

Q. But the evidence here, they refused to let you have other stuff unless you paid cash for it?

A. My agreement was to pay cash for sand and gravel, that was my agreement.

Q. Because they insisted?

A. Not because they insisted; they told me that would give me a discount.

Q. For sand and gravel?

A. Yes.

Q. What was the conversation about crushed rock?

A. We didn't have any regular time to pay for the crushed rock.

Q. Was there any discussion that they would let that run because you had a good bond?

A. I don't think so.

Q. They did not make that concession because you had a bond?

A. I don't think so.

Q. Did they know you were giving bonds for B street?

A. I don't think so.

Q. You sent money from the Vancouver Bank without telling them where to credit it?

A. We paid them from Hartman & Thompson's in Portland.

Q. Different funds you had went indiscriminately all together?

A. Yes, sir; all the money we got each and every time went in there, and no B street account.

Q. One thousand dollars was, you said they arranged with you?

A. I think it was later."

Q. Now, there is another place in here that I want to read:

"Q. What arrangement did you have with the Columbia Digger Company with reference to credits of all money you sent them, where and how it should be credited?

A. All the money I should pay for sand and gravel so I would get my discount, that was the arrangement.

Q. That was all the arrangement?

A. All money paid should be applied on sand and gravel so as to keep up our discount, any money to be paid there should be applied on sand and gravel.

Q. Any money should be applied on sand and gravel so as to preserve your discount?

A. So as to preserve—

Q. And your crushed rock should run?

A. Could run.

Q. And that was done?

A. Yes.

Q. And that arrangement was not called to the attention of your bondsmen?

A. I do not think so; in fact, I know it was not.

Q. Do you remember when that arrangement was made?

A. Cannot say now.

Q. Cannot say?

A. No, sir."

THE COURT: Are you going to ask him to answer all of these?

Q. Did you not testify to all of that?

A. If it is down there, and the court stenographer is correct, I must have.

Q. Do you remember whether or not you did?

A. I cannot remember all of those questions. I remember testifying in that case.

Q. And that is true about that, that was the arrangement?

A. In regard to what?

Q. The arrangement was that the money that came off of B street, or any other source, but particularly the money that came off B street, should go to these parties and be applied first to the payment of sand and gravel?

A. No, sir; it was not; that was not the arrangement, any money that came off B street. It did not make any difference where we got the

money, but our arrangements with the Columbia Digger Company was, always was, that our sand and gravel should be cash.

Q. Should be cash?

A. Yes, or practically cash.

Q. What were you going to do about crushed rock?

A. We were going to pay for the crushed rock upon the completion of B street.

Q. Were you not getting estimates, and was not that the understanding, that you would get estimates every two or three weeks from B street?

A. Every month, I think.

Q. Were you going to pay for your crushed rock when you got your estimates on B street?

A. We had twenty per cent retained there which would have taken care of our crushed rock.

Q. Was that the understanding, that you were to keep back—the city was keeping back that twenty per cent and not you?

A. Yes, sir.

Q. Were you not to pay for your crushed rock when you got your money off the street?

A. There was no arrangements made when we were to pay for it.

Q. Were you going to let that street go until it was completed by the city, and drawing your money from time to time, and not apply anything on the crushed rock?

A. If we had sufficient money to pay for it, we would.

Q. Were you not getting sufficient money from the street every month to pay for the crushed rock that went on the street?

A. I do not know whether we were or not. Our estimates were for about eighty per cent of the work done; if we got a correct estimate. We did not have any crushed rock on East B street until sometime in July.

Q. I am not talking about that. I am talking about your arrangement. At the end of June or July, or the end of the month, you were getting an estimate, or you were getting paid for eighty per cent of what you had done up to that time?

A. Yes, sir; I think so.

Q. I want to know, Mr. Rector, whether it is a matter of fact that of the eighty per cent which you did earn, there was not sufficient during all of the time to pay for the crushed rock that went on that street and more, a great deal more, too?

A. I do not know whether it was sufficient to pay for the crushed rock that went on that street and the work we were taking care of, grading and concrete sidewalks at that time; I do not think it was eighty per cent; in fact, I know it was not, because we did not make twenty per cent off that street. If there had been, there would have been money enough—(interrupted)

We did not use bonds from another street to pay for the sidewalks, to my knowledge. I do not know what became of those Connecticut avenue bonds; they were turned into the bank.

Q. Is it not a fact that all of the money that went into this general account with the Vancouver Trust & Savings Bank was money that you borrowed from the bank?

A. That was my understanding; that money that we borrowed from time to time.

Q. Yes; and borrowed from the bank?

A. Yes; the money we took from other banks—I remember one three-thousand-dollar check drawn on the Gresham bank and being put into the Vancouver Trust & Savings Bank. I think it was in July; maybe it was prior to that. I remember depositing a check for \$2,500 from the Schwabacher people with the Vancouver Trust & Savings Bank at one time. I remember those things very distinctly. Those were checks that went for other purposes. All of the money we got from the Vancouver Trust & Savings Bank was deposited to our general account. We could take it and buy a horse with it, or buy rock, or buy sand and gravel; we never had a check turned down by the Vancouver Trust & Savings Bank as long as we had a balance.

I do not know whether the bank knew that we were receiving crushed rock from plaintiff for the improvement of B street. We did not get crushed rock from anybody else.

I do not know whether that question was ever asked of me by Sparks & Blurock until after they took over the improvement, or how I was paying for it.

We got all of this sand and gravel that we sold

and delivered from plaintiff; I think every bit of it. With the proceeds of the sale of that sand and gravel we paid some indebtedness with it; used it for working, and put some of it into the Vancouver Trust & Savings Bank. That was the money that came back to the plaintiff.

RE-CROSS EXAMINATION.

Q. Now, as a matter of fact, you do not know whether a dollar of that ever came back to the Columbia Digger Company or not?

A. Well, it must have; if we checked on our general account, it must have. I do not know whether it was the identical money.

Q. If you put any money into the bank from any of these other sources, there was enough, there were more than enough checks to eat it up in the next few hours?

A. No, sir; we had an account of seven thousand dollars in the Vancouver Trust & Savings Bank on June 6th.

Q. Well, not at this time. Is it not true that practically all of the time, during all of the construction work, you were in the red?

A. It probably was.

Q. And if you put in there the large amount of money that you have testified about, it was to meet some immediate payment, not to these people, but to somebody else, and the money was consumed for that purpose?

A. Might be for the Columbia Digger Company

or for somebody else; might be for feed—(interrupted)

Q. Were these checks that you gave the Columbia Digger Company what you went to the bank and made special arrangements for?

A. No, sir.

We did not get any crushed rock on October 9th. Our bookkeeper at that time was Mr. Love.

Q. Is not that his writing (indicating book)?

A. It does not look to me like his writing. That does not look correct to me; that is the reason I am studying it.

I do not know whether that is our ledger account with plaintiff; I have no way of identifying it; I cannot tell that this leaf came out of my ledger; I would not swear that it was. That (referring to a book) is our day-book; it was kept by Mr. Love. This is his handwriting (indicating).

Q. Look at the bottom of page 117, October 9th. Do you see any crushed rock from the Columbia Digger people there?

A. 401 yards.

Q. Then you were getting rock on October 9th, according to your own books, were you not?

MR. GILTNER: Before he answers that question—(interrupted)

MR. MILLER: Out of his own books.

MR. GILTNER: It may be out of his own books, but the person who put it there should testify to it.

THE COURT: He has admitted it is his own book. Objection overruled.

Q. Doesn't it appear from your own books that you were receiving crushed rock from these people on the 9th of October?

MR. GILTNER: I object to this testimony, for the reason that the item counsel is asking the witness about is an item which is shown to be put into this book by someone else other than the witness himself, and this witness is not able to testify as to the authenticity of the date, as to whether it was put in correctly, or whether it was the exact date upon which they received the rock. It may have been entered afterwards. I think it is competent to ask the witness if he knows whether that is the date or not.

MR. MILLER: You may cross examine him on that.

MR. GILTNER: I object to it as incompetent, irrelevant and immaterial, and not the best evidence, and he has not given us an opportunity to cross examine the person who put the item into the book.

THE COURT: Objection overruled.

Exception allowed.

That is our regular day-book (indicating) kept by our bookkeeper; his name is Love. I could not say where he is at the present time. Those items on our day-book appeared in regular order on October 9th.

Q. And these items appear in the book on October 9th; "October 9, 1911, crushed rock, 401 yards, crushed rock, 402 yards."

MR. GILTNER: There is another date down here, seventh and twenty-fifth. January, February, March, April, May, June, July—it is the seventh month and the twenty-fifth day, showing that it was received, Your Honor, that it was an entry made October 9th of crushed rock received on July 25th.

MR. MILLER: Not necessarily; the book speaks for itself.

MR. GILTNER: Let the court see that.

MR. MILLER: If counsel will wait until I finish, he may cross examine the witness.

THE COURT: Proceed.

Q. These items are for crushed rock, October 9th?

MR. GILTNER: I am willing that the sheet be introduced in evidence, what the book shows about that item.

RE-DIRECT EXAMINATION.

That item on this page 117 under the head of "Crushed Rock," 7-25, and crushed rock, 401 yards. That 7-25 would be July 25th; I should judge that would be it. Mr. Love might not have posted that ladger until that time. These books were all posted up by order of the bankruptcy court. We were in bankruptcy at this time. We were in bankruptcy in April, 1911. The filings were made against us in bankruptcy sometime in February, 1911.

Earl A. Hackett was called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

DIRECT EXAMINATION.

In the month of September, 1911, I was secretary of the plaintiff, and sort of assistant manager, and ran the steamer. I was master of the boat, and one of the main reasons for being with the boat was to keep track of things. I know the firm, Rector & Daly, and know that plaintiff had business relations with them during September, 1911.

Q. I wish you would state what you did in regard to delivering any material of any kind to Rector & Daly for the improvement of B street, B street in Vancouver, Washington, during 1911?

A. During the year 1911?

Q. Well, in regard to the improvement of B street; yes?

A. Well, we boated rock—(interrupted)

Q. What did you do?

A. Well, I ran the boat for towing the barges.

Q. The barges contained what?

A. Rock from the Riverside Rock Company's quarries at Rooster.

Q. Did you tow all of the rock that was delivered to them for the improvement of B street, that is, to Rector & Daly?

A. I think I did all of it. We had another captain, but, as a general thing I was with the boat and ran the boat.

The last load of rock was delivered to Rector & Daly by plaintiff September 27, 1911. I never in September or November, 1911, or at any other time refused to deliver a barge load of rock from plaintiff

to Rector & Daly until they gave us a check for \$1,000.00

Q. I wish you would explain to the judge, if you have any recollection of making any demands upon them at any time for a thousand dollars, or the reason why it was done, if you did do that?

A. Well, my recollection is that—we delivered a load of rock on September 27, and then, along about October 2nd, we delivered a load of sand, and we were badly in need of money, and I know we went to Rector—we had to keep after him pretty hard about that time to get any money, but I remember of going, along about the first of October, to Mr. Rector, at my father's say-so, to collect some money, and I also told him that we could not furnish any more material unless we got some money. I do not remember whether it was a thousand dollars, or whether a demand was made for a thousand dollars, but I remember I personally told Mr. Rector that we could not furnish him any more material unless we got some money. I never at any time had a barge of rock there and refused to deliver it to him unless he paid us \$1,000.00. The material I had reference to when I told him that was all material. You see about at that time there were a good many rumors afloat—We did not furnish any sand and gravel after October 2nd; I think October 2nd was the last day of any delivery to them, and that was sand.

I remember seeing a paper like plaintiff's Exhibit A. I took it to Vancouver and served it on the

mayor and city clerk and on Mr. Sparks and Mr. Blurock. That was October 17, 1911.

Q. I wish you would state if you had any conversation at that time with either Mr. Sparks or Mr. Blurock about this matter?

A. My recollection is that I did not mention anything, if I remember rightly. I saw Mr. Sparks and Blurock previous to the time that we made this statement, and talked to them in regard to the account.

This was before we served the notice, if I remember rightly, a day or two, or it might have been days. We thought we had to do this to protect ourselves. Messrs' Sparks & Blurock were there. I recollect that they said that they thought there would be money enough to cover it. I served a copy of that notice on each of them personally.

CROSS EXAMINATION.

I told Mr. Rector that we would not furnish any more material until we got some money. I think it was October 5th or 6th, somewhere along there.

Q. Then, at that time what he owed you for particularly was for crushed rock?

A. Yes, I think it was.

We would not have furnished them any more of anything until they paid us some money. We could not afford to because we—we would not furnish him anything, any kind of material unless we felt that he was going to have plenty of money to carry the thing through.

Q. What he owed you for was for crushed rock?

A. At that time, I think there was something like five hundred dollars for sand and gravel. I did not keep the books myself, and I was not so very well versed on that part of the matter; I was on the boat most of the time, caring for the outside part of the work. It may have been \$1,000.00 or \$100.00 for sand and gravel, according to our statement, and possibly \$6,200.00 for crushed rock. We wanted some payments on that crushed rock, because we had to pay for the crushed rock as fast as we got it every month.

Q. And Mr. Rector agreed to pay it as soon as he got it from the city?

A. I do not know as he agreed to pay it as soon as he got it from the city. We were hard up at that time; we had to have money, and we could not wait too long. It was time we had been getting some money from him, from the street, and we were entitled to it.

Q. You knew that you were getting money from time to time from this street?

A. No, sir; I did not know that he got money from the street.

I remember being in your office in the presence of Mr. Sparks, Mr. Blurock and Mr. Sewall, talking about this matter, I should judge that was about the middle of December, 1911. It was in your office in Vancouver, Washington, in the presence of Messrs. Sparks, Blurock and Sewall and Mr. Crass and yourself.

Q. And you told us at that time that you knew

this money was coming from that street, and that were applying it—(interrupted)

A. What is the question?

Q. Did you not tell us at that time—I will change the question: That when you commenced furnishing this crushed rock to Mr. Rector and Mr. Daly on this street, that you had an understanding with them that the money which they received from B street should be applied—(interrupted)

A. No, sir.

Q. Wait until I get through with the question—should be applied on the unsecured accounts, and that you had Sparks & Blurock to fall back on on B street?

A. No, sir; I never mentioned B street. I have understood it is claimed that I said that. I know positively that I never mentioned B street. I might have mentioned and said that the money we received was to be paid for sand and gravel, because it was understood that we were to be paid cash for the sand and gravel, because he got practically cash for it himself.

Q. You were in my office twice?

A. I believe I was.

Q. And I called your attention in this conversation to a decision of the supreme court of the State of Washington, and I told you that you could not do that; that you could not apply—(interrupted)

A. You called my attention to it? You might have called Mr. Sewall's attention to it. I do not remember your calling my attention to anything

there. In fact, I do not remember talking to you. I think Mr. Sewall did all of the talking to you.

Q. You were present?

A. I was present, but I never talked to you personally.

Q. Did you not say that that was the understanding; that you were to apply the money you got from B street—(interrupted)

A. I never mentioned B street at all; I am positive of that.

Q. You remember the conversation?

A. To a certain extent; such as a man could.

Q. Do you remember my calling your attention to a decision of the Washington supreme court?

A. No, sir; not to my attention; probably to Mr. Sewall's. I do not think you talked to me at all. I think Mr. Crass did most of the talking.

Q. Didn't I get that decision down and read it there in the presence of Mr. Sewall?

A. I do not remember it; it is possible that you did, but I do not remember.

Plaintiff Rests.

MILTON EVANS, called as a witness on behalf of the DEFENDANTS, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

In the year 1911, I was assistant cashier of the Vancouver Trust & Savings Bank. I was acting cashier while Mr. Eichenlaub was in Europe. During the year 1911, the Vancouver Trust & Savings Bank received from the City of Van-

couver money on account of the improvement of East B street. We received bonds, the same as money. Those bonds were turned into cash.

Q. On what account was this money received?

A. We had an order for the bonds from Rector & Daly for the city to turn them over to us. Defendants' Exhibit 8 is that order.

The first payment was a cash payment; that was money paid in in cash by the property owners along the street before the bonds were issued. The paper you hand me is a cancelled warrant for \$10,-046.17, dated August 8, 1911, by the bank.

MR. MILLER: I would like to offer that in evidence.

MR. GILTNER: For what purpose?

MR. MILLER: For the purpose of showing that the bank received during this time from the improvement some \$23,000 or \$24,000. I will follow it up with other receipts; that these checks which were issued by these people were paid from this money.

MR. GILTNER: I desire to offer a formal objection at this time to the introduction of this warrant. My objections are these: Unless they can prove, and follow it up and show that the identical money that Rector & Daly paid to the Columbia Digger Company was the money that was obtained on this warrant, that it is incompetent, irrelevant and immaterial, because, I understand, under the decisions of the State of Washington, and all of the decisions that I have read,

that you must prove that the identical money that was received from the improvement was paid by the debtors to the material men, and unless he can prove that that identical money was paid by Rector & Daly to these people, then I object to the introduction of this evidence.

THE COURT: You will be heard upon that in the final consideration of the case. Objection overruled.

Exception allowed.

MR. GILTNER: I want to object on the ground that it is irrelevant, and does not prove that this money was the identical money paid by Rector & Daly to the Columbia Digger Company on account of anything.

THE COURT: Objection overruled.

Exception allowed.

THE COURT: It may be admitted.

MR. GILTNER: Subject to my objection?

THE COURT: Subject to the final consideration of the case, after the briefing and the argument.

WHEREUPON said document is admitted in evidence and marked Defendant's Exhibit No. 9, of this date.

That is my signature (referring to paper).

Q. Did the bank receive bonds from the city clerk for that amount?

MR. GILTNER: Do not answer that question until I see that paper. (Counsel examines paper.) I object to that, if the court please, because this is a self-serving declaration, and also for the reason

that it is not the best evidence. It is simply a receipt for the receipt of some bonds, and it is incompetent, irrelevant and immaterial.

MR. MILLER: I do not know how you can get any better evidence than the official records of the clerk's office.

MR. GILTNER: Official records do not prove anything.

THE COURT: Objection overruled. It may be admitted.

Exception allowed.

A. Yes.

Whereupon the paper was admitted in evidence and marked Defendants' Exhibit 10.

Q. What is that, Mr. Evans, which you now hold in your hands?

A. This is a receipt by the bank to the city clerk for seventy-five hundred—(interrupted)

MR. GILTNER: Now, to save time—have you any more of these?

MR. MILLER: Yes.

MR. GILTNER: I object to the introduction of all of these papers, and have the same ruling—(interrupted)

THE COURT: Are they all similar to the first one; receipts given by this witness to the city clerk?

MR. MILLER. Yes.

THE COURT: Objection overruled. Exception allowed.

MR. GILTNER: As to all of these?

THE COURT: Yes, they may be admitted.

MR. MILLER: I will now have them marked as one exhibit.

WHEREUPON said papers are admitted in evidence and marked Defendants' Exhibit No. 11 of this date.

THE WITNESS: I do not know whether that is on East B street or not (indicating).

MR. GILTNER: I thought you said that they were all the same.

MR. MILLER: Yes.

MR. GILTNER: Well, they are not; the others are off B street, and that is not (indicating). I object to these because the witness says he does not know whether they came off B street or not. I object to that because the witness testifies that he does not know whether the bonds that he received were bonds on account of the improvement of East B street, and also for the further reason that it is not the best evidence; the bonds are the best evidence, and it is incompetent, irrelevant and immaterial.

THE COURT: Objection overruled. It will be admitted as a circumstance.

MR. MILLER: That is all we ask.

Exception allowed.

The bank sold these bonds to Carstens & Earles, Seattle. The money that was derived from the sale of the bonds, if there was any left, was placed to the credit of Rector & Daly; most of it was for taking up their notes.

MR. GILTNER: I object to that and move to strike that part of it, because the books are the best evidence.

Q. What record is kept of this on the books?

A. Every time we received any money, a record was kept of it.

MR. GILTNER: I move to strike that as not the best evidence.

THE COURT: The witness is testifying evidently from his recollection. Motion denied.

Exception allowed.

The money went to the Rector & Daly account. There was a discount on the bonds. The bank paid Rector & Daly either 87½ or 87 cents. They did not get credit for the full face value of the bonds. The first credit on this first exhibit was for cash, and the other was bonds. I have not charged up how much this would amount to. The bank received no further money from East B street, except these bonds and that warrant. I do not of my own knowledge know how much cash the bank received in the settlement that was finally reached in the suit between Sparks and the bank. It was in the neighborhood of \$10,000.00. I do not know how much the bank received as a result of that litigation out of what was left when the contract was drawn up. I do not know as I was in the bank at that time. The arrangement that was made with Mr. Rector about advancing money to take care of the B street improvement account was that the bank was to advance him money from time to

time on the estimates of the city engineer for the work done, the rate it was advanced—he gave a note for it until the bonds were issued. It was advanced on the security of this assignment.

Q. Was there any other money loaned to Rector during that time on any other account?

A. Why, there was—I think not.

I have got part of the bank books here.

Q. Taking up the account of July 5th, 1911, at the time that the check for \$1,017.49, being defendants' Exhibit No. 5—can you tell from the bank books the standing of Rector & Daly at that time, and out of what funds this check was paid? This is the check for \$1,017.49.

According to the bank books, Rector & Daly, on July 6, 1911, had a balance to their credit of \$6.82. The check, defendant's Exhibit 5, together with several checks on the same date, overdrew their account \$1,327.79. The next day, or that same day after banking hours, or else the next morning, Mr. Rector deposited \$2,300.00. The deposit was made July 7th, either on the morning of July 7th or else on July 6th after banking hours.

Q. Do you know where that \$2,300.00 came from?

A. I think it came from a note.

MR. GILTNER: I move to strike that answer.

THE COURT: Motion granted.

Q. Have you the note book here showing?

A. I have a record here that would show that.

Q. Will you get that record please?

(Witness produces book and papers.)

Q. Now, will you turn to that record of notes and see whether or not a note was given on that date?

A. What date was that?

Q. July 6th.

A. (Consulting book). On July 7th—the note was dated July 6th—it was noted of record July 7th—it was given on July 6th after banking hours, evidently, for \$2,300.00.

MR. GILTNER: Is that your handwriting?

A. No, sir.

MR. GILTNER: Whose writing is that?

A. Otto Zunstead.

MR. GILTNER: Did you see him put that in there?

A. Yes; I look these books over every night.

(By MR. MILLER):

Q. Was that the regular bank book kept at that time?

A. Yes, sir.

Q. What is that book you hold in your hand?

A. That is the note register.

MR. MILLER: I would like to offer in evidence this line:

MR. GILTNER: Just a minute. Have you made any effort to obtain the original note?

A. No, sir; Mr. Rector has got that.

MR. GILTNER: Have you made any effort to get that note?

A. No, sir; I never asked him for it.

MR. GILTNER: We, therefore, object to the introduction of this secondary evidence; it is not the best evidence, and no evidence that they have made any effort to get the best evidence.

MR. MILLER: I do not know what better evidence there can be than this.

THE COURT: Objection overruled. Exception allowed.

(By MR. MILLER):

Q. I will ask the witness to read that line into the record.

A. "Entered on July 7th; Rector & Daly indorsers; security, collateral estimates East B street No. 811, dated July 6th, 1911, payable on demand, \$2,300.00; nine per cent interest. Paid September 11, 1911."

After the note was paid it was given to Mr. Rector. The collateral security for that note, according to our record, was the estimate on East B street. That was the only funds that he had on hand at that time. He was overdrawn \$1,327.79. After this check was paid, there would be left to his credit from that note \$931.80—that would not be quite right; he had a little deposit that day of \$40.41, leaving a balance of \$931.80. That is the same day.

Q. Calling your attention to defendants' Exhibit No. 1, of August 8th, could you tell from your records out of what fund that check was paid?

THE COURT: What is the amount of that check?

MR. MILLER: \$1,216.00.

THE WITNESS: What is the date of payment?

MR. MILLER: Payment, August 11th.

MR. GILTNER: The court understands my objection goes to all of this testimony, for the reason that in the Federal court they have right to make an equitable defense to an action at law, which he is undertaking to do there.

MR. MILLER: We contend that it is not an equitable defense in any event.

A. That check was presented and turned down; payment refused for want of funds. He was at that time overdrawn in his account, and the check was then returned to the bank and protest—the check was then protested and afterwards returned to the bank on August 11th, and Mr. Rector made a deposit by giving his note for \$1,306.00, which was placed to his credit on that date.

This money must have been paid out of that note by this check, for he was still in the red after it was paid. All of these notes were secured by the estimates on East B street. The amount of that note was \$1,306.00. The original amount of the check was \$1,216.25 and it was raised to \$1,219.00, because of protest fees. When the check was presented, there were no funds to take it up. At that time he was in the red \$661.93. All of the notes that were taken from Mr. Rector were secured by this assignment of the work he done on East B street.

MR. GILTNER: Does that book show this se-

curity was given for that, that note of \$1,306.00?

A. No, sir; this note was not secured by that. This was secured by a sight draft on Sanborn, Cutting Company, of Astoria.

(BY MR. MILLER) :

This was the check, if the court please, which was marked as payment for crushed rock.

The check for \$3,000.00, September 6th, was paid by a note for \$4,000.00, but it does not show what the security was.

Q. Is that the note which I hand you?

A. (Examining paper) Yes.

Q. Now, what was that note against, Mr. Evans, of your own knowledge, without the book?

A. It was against the assessments on East B— against the estimates on East B street.

His condition prior to the time this note was given was that he had a balance of \$375.88. That was the balance before the note and check were given. This check was not protested; it is marked "Insufficient funds," and not undoubtedly went back to the bank and was then called in. These marks on the back indicate the bank it came through.

Defendants offer in evidence the note for \$4,000.00, and the same was, without objection, admitted in evidence and marked Defendants' Exhibit 13.

The papers that I hold in my hand are deposit slips, passed in with the deposits; they form a part of the records of the bank, made while I was in the bank and cashier. They are from the bank; brought here by me, and have been in my custody all the

while. The check for \$859.90, dated July 17, 1911, was paid by a deposit made on July 18th. A note was given for \$2,079.40. Before the note was given he had overdrawn his account \$2,565.43. He gave his note for \$2,079.40. The note was made up of estimates on Fourth Plain for \$990.40, East B street \$574.20 and Connecticut avenue \$514.80. That note was paid September 11th. I cannot tell out of what fund it was paid.

On September 7th we received \$7,500.00 worth of bonds from the East B street improvement. On September 11th he made a deposit of \$11,046.17, and also made some other deposits, \$257.57 and \$67.70 on the same date. I do not know where that large deposit came from; I have not that.

MR. MILLER: We did not bring those here. I want to state to the court in fairness to ourselves, that we have not the September deposit slips; we overlooked them.

THE COURT: This case is evidently going on until tomorrow, I will say for the benefit of both sides.

MR. MILLER: Well, I do not think we can get them here by morning.

On the date of the check for \$501.00 he had money to pay it.

Q. Can you tell out of what funds the check was paid?

A. I can tell you what the deposit was. The day before he was in the red, and the day before he gave us a note for \$5,770.00, secured by estimates

for work done on East B street, and \$1,115.75 was money that was paid in by Mr. Norris. The day before he was overdrawn \$31.42. Then he gave the note for \$5,770.00, based on estimates on East B street. They were both deposited on the same day.

CROSS EXAMINATION.

He paid that check with that money that was put on deposit. I could not tell whether it was paid with the \$1,115.75 paid by Norris or with the \$5,770.00 borrowed on the note; they were both together.

Q. And your testimony applies to all of the other deposits or payments or checks where there was a co-mingling of other deposits, you are not able to tell with what he paid the checks?

A. Wherever there was co-mingled deposits; no, sir.

Q. You are not able to tell with what money he paid the checks?

A. No, sir.

Q. Now, you have testified in a general way, Mr. Evans, in the beginning of your testimony, whether you did it advertently or inadvertently, that all of the moneys that were advanced by the bank to Rector & Daly were advanced on the credit of the assignment of Rector & Daly of warrants coming from East B street.

A. I think I said that.

Q. You are mistaken about that?

A. I was mistaken about that to this extent;

that there was estimates on Connecticut avenue and Fourth Plain avenue.

Q. Did you know that when you made the general statement to the judge?

A. Yes, sir.

Q. Why did you not qualify it instead of leaving it stand?

A. I made a mistake, that is all.

Q. You made a mistake about that?

A. I did not think there were any estimates on Fourth Plain avenue after the 1st of July.

MR. GILTNER: I move to strike that answer as not responsive to the question. I am not asking him what he thinks; it is not responsive to the question.

MR. MILLER: It is an explanation.

THE COURT: Motion granted.

THE COURT: This July 17th referred to, was estimates on Fourth Plain?

A. Yes, sir.

There were no written contracts made by Rector & Daly with the bank. Most of the verbal agreements were made by Mr. Rector. I was present most of the time. I was not present all of the time when these notes were given, but I was consulted before the notes were given. Mr. Rector was not always present when I was consulted.

Q. Then the testimony you have given here in regard to the securities that were given by Mr. Rector for a great portion of the moneys that he ob-

tained from the bank was what Mr. Bouten told you, isn't it?

A. Some of it.

Q. And Mr. Rector was not present?

A. Not all of the time; some of the time he was.

Q. Can you testify now to any particular occasion when he got any particular amount of money that you have testified to, wherein he agreed with Mr. Bouten that the moneys that he should obtain from the bank would be secured by this assignment, or that verbal contract, or the assignment of the warrants derived from the improvement of East B street? Can you tell any one time?

A. I do not know as I can.

I have testified in regard to notes for \$5,770.00, \$2,079.80, \$1,306.00 and \$4,000.00

Q. There was obtained on June 16, 1911, \$192.50 from the bank, was there not, or notes given for \$192.50?

A. I expect so; yes.

Q. And the total number of notes given, taking my count for it, sixteen notes were given by Rector & Daly for the sum of \$25,220.74, obtained from the bank?

A. I expect so.

Q. Don't take my word for it.

A. I think those notes are correct; they look like it.

Q. Are you able to tell the court here, of your own knowledge, where Mr. Rector for Rector & Daly gave the note of Rector & Daly to the bank for

any one of these sums where the security for the payment of the note was the assignment or verbal agreement between Rector & Daly and the bank for the proceeds of the warrants to be derived from the improvement of East B street, of any particular time?

A. The security of these notes I have testified about was the assignment that was put on record in the clerk's office. And that is the only way I know it. I do not remember whether I was present when the agreement was made between them.

Q. Is it not a fact that all you know about it is what Mr. Bouten told you about the security and that agreement?

A. Yes; all of the assignment.

Q. Is it not a fact that all you know about it is from the assignment itself and what Mr. Bouten told you?

A. Mr. Bouten and the balance of the board of directors.

Q. And was Mr. Rector there at the time they told you these things?

A. Not always; sometimes he was.

Q. What time was he when any particular amount you ca nname—(interrupted)

A. I could not say; I could not remember.

MR. GILTNER: I move to strike out all of that testimony in regard to the application—the testimony given with regard to the security for these notes and the application of the moneys, derived from different sources for the payment of these

notes, because the testimony is hearsay, and he is not able to testify of his own knowledge of any particular item, except what he was told.

THE COURT. Motion denied. Exception allowed.

These papers that I testified from are the individual ledger sheets of the account of Rector & Daly, the defendants in this case. They are the original records. The column marked "Debit" is where the checks are entered, and these credits here (indicating) are deposits.

These ledger sheets were offered in evidence by the plaintiff, and the same were, without objection, admitted in evidence and marked Plaintiff's Exhibit C and D.

RE-DIRECT EXAMINATION.

When I use the expression "In Red" I mean that whenever a party overdraws his account, the amount is put down in red ink, and it means that the account is overdrawn to that amount.

Q. In your examination yesterday afternoon in speaking of defendants' Exhibit No. 1, check originally for \$1,216.00 and the line on the note book indicating that some additional security was given for that check; do you remember that?

A. The note on that date was for \$1,306.00. Is that the one you have reference to?

Q. Yes; that is the one I have reference to.

A. The note was given on that date for \$1,360.00; it was the same date that the check was paid. The record shows that the note was given on a sight

draft drawn on Sanborn, Cutting Company, Astoria. I know about that sight draft personally.

MR. GILTNER: I object to that. If the note was issued on that security, whether they collected it, or whether it was good or bad, does not make any difference if the money was secured on it.

THE COURT: Objection overruled. This proposition being developed about where the money came from to pay these things, if the note was not paid it might have some bearing upon that. Exception allowed.

I remember personally about the giving of that note. I will explain the whole transaction. Mr. Rector came in the day before this note was given and wanted some more money to complete his work on East B street, and Mr. Bouten called a meeting of the board of directors that night to discuss this matter, and this note was authorized by the board of directors, and Mr. Bouten had there this sight draft on Sanborn, Cutting & Company, and he reported to the board that Mr. Rector—well, I heard Mr. Rector this same day offer this sight draft on Sanborn, Cutting & Company as additional security. This was discussed in the board meeting. The money was borrowed to proceed with the work on East B street.

Q. What was the note made a charge against?

A. What was the security, do you mean?

Q. Yes; what was it based against?

A. It was based against this assignment on East B street. That security was never collected.

It was sent in through the usual course of correspondence, and it was returned marked "unpaid." The bank received nothing on this sight draft.

Q. I call your attention to defendants' Exhibit No. 2. I omitted this yesterday—I overlooked this one—this is a check for one thousand dollars. Do you remember the circumstances of the giving of this check?

A. I do; yes, sir.

Q. Did you have a conversation with Mr. Rector or Mr. Daly about it. Mr. Daly came into the bank one morning—(interrupted)

Q. Of Rector & Daly?

A. Yes; and told Mr. Bouten that he had drawn a check for a thousand dollars—he did not say he had drawn it—that they had issued a check for a thousand dollars to the Columbia Digger Company, and that there was a barge of rock—he did not say whether it was on the way or whether it was there, but that there was a barge of rock they could not have unless this thousand dollars was paid, and it must be paid, or they would have to quit work.

Q. What was done, if anything, in regard to giving a note for one thousand dollars?

A. I do not remember of it. Our record shows the date October 10th. They gave a note on the 14th to cover that check.

MR. GILTNER: Read the record.

A. "Rector & Daly, by A. B. Rector, President, No. 1080, October 14, 1911; ten days after date; due October 24th, \$1,022.00." That was paid on

7-3-12, that is, July 3, 1912. That was paid on July 3rd, 1912. The date it was given was October 14, 1911. At the time plaintiff's Exhibit D was given, Rector & Daly's account was just balanced. I was in the bank at the time this work was being carried on. I remember that there were deposits that came in there to the credit of Rector & Daly from Wilds and from other sources. They were placed to the credit of Rector & Daly and checked out in the usual course of business; checked out about as fast as they came in, and faster, too.

RE-CROSS EXAMINATION.

I do not think that there was an agreement between the bank and Mr. Rector that he could overdraw his account there. If there was, I never heard anything about it. There was an agreement that he should be advanced money on these estimates. There was no permanent agreement that he should be advanced money on these accounts. He came in occasionally and said that there were checks out, and that he would like to have them taken care of, but there was no understanding or agreement. There was an occasion where he overdrew the account of Rector & Daly, and there was no agreement that he should overdraw it. Sometimes the bank honored these checks and sometimes it did not.

Q. Did it ever happen in regard to the improvement on or money drawn on account of East B street?

A. Yes, quite frequently. He was ordinarily called up that same day, or came in that day usually,

after the bank closed, or during banking hours.

Q. Take this thousand dollar note: This note was given on October 14th, three or four days after the check, was that thousand dollars an overdraft?

A. The check was not there at the time that he came in and made arrangements to honor it; he said he had drawn it, and if we did not honor it he would have to quit.

I was supposed to keep the book that I have been reading out of with reference to this \$1,000.00 note, but I did not do it all of the time. It was kept under my supervision. The entering this \$1,022.00 note, October 14, 1911, was done under my supervision. I was present when it was done and knew the entries that were being put in there.

Q. Why didn't you, then, if this note was given as security on the estimates that were to be given on the East B street improvement, enter that in there as the reason for which this thousand dollar note was issued, in addition to the fact that this sight draft was given as collateral security for the payment of it? Why didn't you enter that in there?

A. I did not think it was necessary.

Q. Now, you made a statement about Mr. Daly coming in there about the holding up of a barge of rock?

A. Yes, sir.

Q. Do you know whether this was true or false, of your own knowledge?

A. Only what he said.

Q. Is it not possible that he told you that they

had to have a thousand dollars to pay for material, and that unless they got that thousand dollars they could not get any more material, or words to that effect?

A. Well, he said that there was a barge of rock.

Q. Don't you know that Rector & Daly a number of times passed out checks on the Hartman-Thompson bank in Portland, Oregon, and put them in the bank and got credit on them?

A. Yes, sir.

B. L. DORMAN, witness called on behalf of the DEFENDANTS, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am the city engineer of Vancouver, Washington, and was working for the city during the summer of 1911, as principal assistant city engineer. The engineer was H. H. Lotter. I had something to do with the making out of the estimates on B street. I know that estimates were made and turned into the city the first of every month; once a month. This bunch of papers are those monthly estimates of Rector & Daly, contractors on East B street; estimates of the work done up to the first of each month on the improvement. The first estimate was on April 1, 1911. I think the last one is December 1st, the same year.

MR. MILLER: I would like to introduce these in evidence, if the court please.

MR. GILTNER: Let me see those.

CROSS EXAMINATION.

The paper dated Vancouver, Washington, November 1, 1911, is not in my handwriting. I did not write that. It was made out by H. H. Lotter. He and I figured out the estimates a great many times. I did not make out those figures \$2,108.00; I probably worked it up.

Q. I am asking you whether you know whether you did or not?

A. Not entirely, perhaps, I did not. I usually brought in my field work of the—field book of the work the men did on the street; that was my business. My field books are in the office at Vancouver. A great many times I would write the estimate and he would make a notation of it and put it into the book. I cannot positively say whether I calculated those figures every month of the time or not. They are not in my handwriting. I would not say positively whether I made all of those estimates or not, but I usually and most always helped him to compute the estimates. Those are the original estimates of the city made under this contract; they are the official records of the clerk's office. I have seen them in there, and I know they were filed. I know the signature of the city clerk; that is his signature.

MR. MILLER: I will be sworn and say that I got them from the city clerk myself.

MR. GILTNER: Well, did you?

MR. MILLER: Yes, I did.

MR. GILTNER: Well, that is all right.

These estimates were thereupon offered by the

defendants in evidence, and received in evidence, and marked Defendants' Exhibit No. 14.

The witness further testified:

These are all of the estimates of East B street; they are the entire estimates turned in by the contractor.

CHARLES DALY, called as a witness on behalf of the DEFENDANTS, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am one of the original members of the firm of Rector & Daly. I am the Mr. Daly who has been referred to here. I remember the issuance of a check for \$1,000.00 on October 10, 1911.

I could not tell the exact date when I got the check; it was somewhere between the 5th and 15th of October. Mr. Rector called me up from Captain Hackett's office in Portland, and told me that they would not unload a barge load of rock which was at the dock, and had been there for some time, unless we paid them a thousand dollars. I went up and got Mr. Stapleton, one of the directors of the bank, and also the attorney for the bank, and went down to the bank and saw Mr. Bouten, and he let me have the money, and I 'phoned back to Portland to Mr. Hackett.

THE COURT: Did I understand you to say that any particular amount of money was mentioned?

A. A thousand dollars; yes, sir. That was what I borrowed from the bank. It was mentioned in the conversation from Mr. Rector. Mr. Rector drew

the check; I did not draw it. He, I think, gave it that morning over there. The signature on defendants' Exhibit No. 1 is his handwriting. I think the body of the check is Mr. Love's handwriting.

I know there was a barge at the dock there, as it was set in and out from the dock several days. The Barber people were unloading rock from the same dock. These people had a barge of rock there at that time, but I do not know how long it had been there.

I did not personally give a note for that \$1,000.00. Mr. Rector signed the note. I was not, personally, over at Vancouver during the construction of this work very much; I was there very little. Mr. Rector had charge of the work. I was on the Bull Run pipe line until the latter part of August.

I remember throwing up the contract. The time we surrendered it to our bondsmen I think was somewhere near the 15th and the 20th of October, 1911. We entered into an arrangement with Mr. Bouten to carry on that work. He was to advance us money for the material on B street, and the contract was assigned over to him, and all the estimates was made out to him, and by doing that way, he was to advance us the money from time to time to carry on the work on B street. He was to get his money on the estimates once a month. The contract with the city provided for the estimates once a month. We were to be paid by the city once a month. The first of each month we were to get an estimate less 15 per cent; I think some was 15 per cent and some was 20 per cent.

CROSS EXAMINATION.

Q. Mr. Daly, do you know whether Captain Hackett, or anybody connected with the Columbia Digger Company, was present at the time Mr. Rector telephoned to you in regard to the thousand dollar check?

A. I could not very well, with him in Portland and me in Vancouver.

Q. You do not know whether they were present or not?

A. No, sir.

MR. GILTNER: If the court please, I move to strike out that testimony as substantive testimony against the Columbia Digger Company, the—as to showing that the check was given as against the Columbia Digger Company. I think it is competent against any testimony that Mr. Rector gave, but as against the Columbia Digger Company, that conversation could not be in evidence against them; they, not being present, could not be bound by that testimony. They have their side of the story, and they have testified as to why that thousand dollar check was given. Counsel has asked Mr. Rector on cross examination, and brought this matter up about that thousand dollar check, concerning which we asked him nothing. That was brought out directly by Mr. Miller. This evidence might be introduced as against the conduct of Mr. Rector, but it cannot be used as a substantive evidence and the purpose for which the money was obtained as against the Co-

lumbia Digger Company, because the evidence here shows that none of them were present.

THE COURT: If it is competent for any purpose, there is no way to strike it out.

MR. GILTNER: Well, I wish to have the record show that it is not competent evidence as against the Columbia Digger Company, because the evidence shows that they were not there at the time this conversation took place.

THE COURT: That is something to be argued on the merits.

MR. GILTNER: Would not the court make a ruling on a question of that kind, that it should not be taken as evidence as against them?

MR. MILLER: It is before the court. What is the use of it?

MR. GILTNER: There is a whole lot of use of it.

THE COURT: I cannot advise you as you go along as to what weight should be attached to every bit of evidence that is in. Exception allowed.

We surrendered this contract on B street to Rector & Daly sometime between the 15th and 20th. I know when I did that, but I cannot give you the real date. We abandoned that contract at the same time we turned it over to the bondsmen. We did not abandon it prior to that time, abandon the work on it. I was there at the time. I was not present when this contract was made with the bank for the advancement of money to Rector & Daly for the carrying out of the purchase of material for the im-

provement on B street. It was made by Rector & Daly and the bank.

Q. All you know about it is what has been told you by somebody else. All you know about what the contract was for, or the consideration of the contract, was what somebody told you?

A. Mr. Bouten told me and Mr. Rector.

Q. Did you have any conversation with Mr. Bouten in regard to advancing money to Rector & Daly on B street prior to the time that this paper was made by Rector & Daly?

A. No, sir—yes, I did, too. That conversation was before and afterwards. I talked with Mr. Bouten about that before; Mr. Rector was with me. We met Mr. Bouten on the street and talked about it, and he told us it could be arranged to get money from the bank, and I talked with Mr. Rector over the 'phone several times, and knew the time the contract was made and what it was.

I did not go down to the dock to see if there was a barge of rock there in possession of the Columbia Digger Company at the time Mr. Rector telephoned to me that they would not release it to us or turn it over until the \$1,000.00 was paid. I just came from the dock before that; I know it was there; I had been there to the dock every day fifteen or twenty times every day for several days. The barges were delivered to Rector & Daly when unloaded onto the dock. Rector & Daly did not have the right when they were released there by the tow-boat, to unload them onto the dock when the tow-boat left.

They had no right to unload barges at any time. The plaintiff unloaded them, I suppose; it was their plan to unload them. It was the duty of plaintiff to unload this barge of rock into the bunkers in delivering it to Rector & Daly. I was not present when the contract or agreement was made between the parties as to what should be delivery.

RE-DIRECT EXAMINATION.

I saw it when I was back and forth from the dock.

JOHN J. CASPARY, called as a witness in behalf of DEFENDANTS, being duly sworn, testified as follows:

DIRECT EXAMINATION.

The statement handed me, which purports to be a statement of account between plaintiff and Rector & Daly, was made out by me. It was taken from plaintiffs' books at the time it purported to be dated. I was then bookkeeper of the plaintiff.

MR. MILLER: I desire to offer this in evidence. It is a statement made by this witness of date December 30, 1911, in which there is no application of these payments in the manner which they now indicate that they have been applying them. It is simply a running account.

Q. Do you know whom that was given to?

A. No, sir; I do not.

MR. GILTNER: I would like to ask a question or two before that is done:

Q. I wish you would look at this statement and state if that is a correct copy of your books?

MR. MILLER: I did not ask him anything

about that. That is not proper cross examination.

Objection overruled.

Q. In regard to the application of payments?

A. These statements were not made at the same time.

Q. Is it not a fact that you testified yesterday that your books show a notation on the side of the application of these payments?

MR. MILLER: I object to that as improper cross examination.

Objection sustained.

A. I did not examine these statements carefully at the time I first made the examination. These statements were drawn on different dates, and the application of the thousand dollars here—I made that application wrong.

Q. In what respect?

A. Well, I credited it here on the rock account, when my notation does not say anything about the rock account, the notation in my ledger.

Q. Well, you made those, did you?

A. Yes, sir.

MR. GILTNER: Well, I think they are entitled to go on record if you made them.

MR. MILLER: You made them from the books?

A. Yes, sir.

THE COURT: They may be admitted.

WHEREUPON, said papers are admitted in evidence and marked Defendants' Exhibit No. 15.

MR. MILLER: I want to offer in evidence a

paper, the statement which this witness identified yesterday. No objection.

WHEREUPON, said statement is admitted in evidence and marked Defendants' Exhibit No. 16.

M. R. SPARKS, called as a witness on behalf of the DEFENDANTS, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I am one of the sureties on the bond of Rector & Daly. I know Mr. Hackett, who testified here yesterday. I had a conversation with him along in the fall of 1911.

I have seen defendants' Exhibit No. 15 before. Mr. Hackett, or Mr. Sewall, one or the other, handed it to me; I think it was Mr. Hackett. I was present in your (Mr. Miller's) office when a conversation was had between Mr. Hackett, Mr. Miller and others. It was late in December, 1911, I think; I am not sure. There were present Mr. Hackett, Mr. Sewall, Mr. Miller, Mr. Crass, Mr. Blurock and myself.

Q. Now can you tell the court what Mr. Hackett stated to those present as to his arrangement with Rector & Daly, and what application they had been making of the payments of the money received from the work on B street?

A. He plainly said that Sparks & Blurock were supposed to be able to pay this deficiency on B street, and that they had credited all of the money they had received from B street on their sand and gravel ac-

count, because the bond was supposed to be amply sufficient to pay the rock account. He said that he had an understanding with Mr. Rector to that effect. That Mr. Rector was to pay the value of the sand and gravel, and leave the other amounts stand. He said that all of the money they had drawn from the B street account had been applied on the sand and gravel account.

Q. You do not understand. What, if anything, did he say as to the arrangements with Mr. Rector as to how the money coming from B street should be applied?

A. I do not remember exactly how he worded that, but he admitted plainly that he had not given us credit for any of the rock, any of the payments that came from that street, on the rock account.

Q. During the time, did you know anything about what application they were making of those payments?

A. I had talked with Mr. Rector numerous times during the summer, and he said he was keeping his payments up. I had looked at the bank records. They had shown me that they had paid Rector & Daly checks.

I know nothing about the arrangements between Rector & Daly and the people furnishing the material, as to the arrangements they had as to the application of the payments.

CROSS EXAMINATION.

I first learned that plaintiff was furnishing crushed rock on this street early in July, 1911. I

heard it from Mr. Rector. I do not know when they first started in to deliver; that is the first I knew of it. Mr. Rector was working on the street there at that time. I know that he had turned over these payments of these warrants to the bank. I think I first learned that along early in July, 1911. I could not say when exactly.

Q. You say you do not know what the young Mr. Hackett stated as to what arrangement Mr. Rector had with the Columbia Digger Company in regard to the pay for the sand and gravel?

A. Well, he said that they had arranged to—(interrupted)

Q. I understood you to say that you did not know what it was?

A. All right; if I said I did not know, that goes.

Q. Well, do you know?

A. No, sir. Mr. Rector told me that he was making payments to plaintiff. It was my business to inquire, to see that it was kept up. I did not go to the plaintiff to find out whether he was telling the truth or not. I saw checks were being paid. I did not make any effort to find out from plaintiff as to whether he was, or had made any payments on this. Mr. Blurock and myself were not partners; just individuals.

Q. Now, Mr. Sparks, in order to clear this up and save further time, and get away, I would like to ask you several questions in regard to the amount of money that was owed on this improvement of East B street after you took hold of it?

MR. MILLER: I do not think it is material; they had to complete the contract, and they did complete it.

MR. GILTNER: I want to show how much money they received and paid out. I think the court is entitled to know that.

MR. MILLER: What materiality has it?

MR. GILTNER: It has this materiality: I contend here that they received enough, if not more than enough, to pay this account, and that they disregarded it, paid everything in Vancouver, and paid these people nothing, and that they had in their possession, after they had paid these other bills in full, some fifteen hundred dollars, and they still have that in their possession.

MR. MILLER: It is not proper cross examination.

MR. GILTNER: I will make him my own witness, to save time.

MR. MILLER: My position is that it is wholly immaterial. If these people have not paid for the rock that they put on East B street, that ends it, so far as they are concerned; if they have not been paid, then we are liable, if we are liable at all, and what we did with the street after we took charge of it, whether we paid off the rock claims against it or not, is of no consequence to them.

Objection overruled.

Q. Now, Mr. Sparks, is it not a fact that at the time that Mr. Sewall and Mr. Miller, and Mr. Blurock and Mr. Earl Hackett and Mr. Crass had that

conversation in Mr. Miller's office, that they met there for the purpose of compromising or settling this claim of the Columbia Digger Company? Is not that a fact?

A. I think not.

Q. Is it not a fact that at that time and place you people offered to settle this bill with the Columbia Digger Company by paying them approximately fifteen hundred dollars?

MR. MILLER: I object to that as incompetent.

MR. GILTNER: I intend to follow that up with another question.

THE COURT: Are you going to prove his admissions with an offer to settle—(interrupted)

MR. GILTNER: Your Honor will find that I do not want any advantage in this, and I do not propose to do that in my brief, and I want Your Honor to particularly know right now that I am not asking it for that purpose.

THE COURT: Objection overruled.

Q. Is it not a fact that it was stated at that time that you had fifteen hundred dollars over balance left after having paid the bills for the completion of that street?

A. It may have been mentioned, although I think not, that day. I did not make that statement. I do not think Mr. Blurock made it. I do not think it was made. I did not state it was made at all.

Q. Did you have that amount over?

A. We did. We never paid any of that money to the plaintiff. We still have a part of that money. I

could not tell what were the bills of Rector & Daly when they turned this over to us; could not tell what they owed Mr. Wentworth; I have no books with me.

Q. Did you not testify in the case of W. R. Sparks and C. A. Blurock, plaintiffs, against the Vancouver Trust & Savings Bank, a corporation, defendant, in the Superior Court of the State of Washington, in and for the County of Clarke, as follows—and before you testify, I am going to show you the questions and answers that you gave in that case. Can you read that (indicating)? Take this question:

“Q. What is the amount of Mr. Wentworth’s claim?

A. I don’t remember definitely; \$5,500 to \$5,700.”

Q. Did you make that answer to that question?

A. More than likely I did.

“Q. Do you know anything about the DuBois Lumber Company?

A. Yes, sir; \$202 or \$203.

Q. And the Columbia Digger Company?

A. They claim very closely to \$7,000.

Q. What was that for?

A. Rock on the street.

Q. Rock on the street. Had they served any notice on you as to the amount of their claim?

A. Yes, sir.

Q. When did you receive that paper, Mr. Sparks?

A. Just before the 20th of October. I don’t remember the exact date it was given me.

Q. Who gave it to you?

A. Mr. Hackett of the Columbia Digger Company.

Q. Do you know how much you expended in the completion of the street?

A. Very nearly \$3,300."

Q. Are those answers and questions correct?

A. They are.

I do not know how much bonds we received from the city and from this bank for and on account of the improvement of East B street after it was turned to us by Rector & Daly. I swore to the complaint in this case against the bank. I remember testifying in that case that there was a balance due, swore there was a balance due of \$11,633.98 in bonds. I found that out from my attorney, A. L. Miller. It is probably a fact that I received that amount from the city in bonds.

Q. Is it not a fact that you also received from Rector & Daly \$2,500 from Connecticut street?

A. I do not remember the amount.

Q. Well, did you not receive approximately that amount?

A. I do not know. I received the money; I do not know whether it was a considerable amount of money; I have not the books with me.

Q. If you were paid a large amount of money, you would certainly know—(interrupted)

MR. MILLER: Connecticut street had nothing to do with this.

MR. GILTNER: I will show that this went

towards East B street. I want to show the court that these people are not losing a dollar, and that they have discriminated against these people in favor of people in Vancouver, discriminated against the Columbia Digger Company; that they are not out a cent on this proposition; that they have not paid the Columbia Digger Company a cent on this proposition.

THE COURT: Proceed.

Q. Is it not a fact that it was about \$2,500 that you received from Rector & Daly on account of the improvement of Connecticut street?

A. The money was paid out on Connecticut street. There was no profit on that; we were bondsmen on that as well. It was a separate fund entirely.

Q. Now those were all of the debts of Rector & Daly, the Wentworth debt, and that \$203 debt, and about \$7,000 of the Columbia Digger Company, that Rector & Daly, or that you assumed and paid on account of the improvement of East B street. Is that not a fact?

A. No, sir.

Q. Except this \$3,000 you claim you paid out?

A. No, sir. I paid many other bills. I paid the Barber Asphalt people over \$1,000.00. I have not any books to show that. That went into the East B street improvement. It was for rock. That is not what I paid for the completion of it afterwards.

Rector & Daly bought \$1,000.00 worth of rock to go into East B street from the Barber Asphalt

people. I could not tell what else I paid; I have no books with me.

Q. Can you mention any other items besides that?

A. Not necessarily.

It is not a fact that Rector & Daly turned over to Sparks and Blurock a \$1,000.00 that belonged to the Barber Asphalt people; I am sure of it.

RE-DIRECT EXAMINATION.

I have stated that I received \$11,633.98 in bonds. There was a discount on those bonds. The Vancouver Trust & Savings Bank got the last bonds. They were turned over to the bank in the first place. We had some litigation over that. I think we got from the bank, in cash, as a result of that litigation, a discount of about 15% on the bonds. I do not know the exact amount. As a result of that decision, the bank got some of this money. I really have forgotten how much; several thousand dollars. We turned over to the bank out of that amount of money that counsel has been asking about, \$1,718.30. That went to the Vancouver Trust & Savings Bank; that was a part of the last bond issue.

The total amount of cash received was \$10,877, and of that amount \$1,718.00 was turned over to the bank, and the balance was used on the completion of the street. There are twenty or thirty small claims that have not yet been satisfied. I told you this morning of a large one; that was for asphalt used; something like \$3,000.00. I have not the bills

with me. These claims are in addition to the claim that the plaintiff is suing for here.

Q. Now, Mr. Sparks, you stated awhile ago, in answer to counsel's question, that you did not know anything about the arrangement between Mr. Hackett and Mr. Rector. What do you mean about that, as to the conversations you had with Mr. Hackett about it?

A. When he first came into the store, he introduced himself as Captain Hackett, and the other gentleman, Mr. Sewall, told me their business, and I asked them if Rector & Daly had not been making payments on this account, and they also handed me a bill showing a mixed bill for everything, to show where the payments had been made all down, and it was all made out of a fund of B street; they acknowledged that themselves, and later they said they had credited this on the sand and gravel account instead of the rock.

Q. In any of these conversations, did he give you the information, tell whether or not there was an understanding between him and Rector & Daly?

A. Yes; Mr. Hackett did.

RE-CROSS EXAMINATION.

Q. You stated finally, after having stated to me that you did not have any other bills to pay, except one or two small ones, in response to a question by Mr. Miller, that you had a big bill of three thousand dollars to the Barber Asphalt Co.?

A. I made no such statement.

Q. What did you state?

A. I said there was a bill presented for asphalt. I have not paid it and never intend to pay it; I do not owe it.

I cannot give the date of the conversations between myself, Mr. Hackett and Mr. Sewall in my store about which I was asked on direct examination. It was the year 1911; I think it was in the month of December. The improvement was not quite complete; I think not; I am not sure whether it was complete. They asked us what arrangements we expected to make for the payment of plaintiff's claim. Mr. Hackett told me they had credited their sand and gravel account, and expected to hold us for the rock.

The PLAINTIFF thereupon introduced the following evidence in rebuttal:

RUSSELL E. SEWALL, called as a witness on behalf of the PLAINTIFF, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I heard the statement of Mr. Sparks here in regard to the conversation had with Mr. Hackett in Mr. Miller's office. I remember of being in Mr. Miller's office with Mr. Hackett. My recollection is, and I have looked up my letters to verify my recollection, that it was the latter part of July or the first of August, 1912. I was in the office or store of Mr. Blurock in 1911. I went over to the store one time with Mr. Hackett, the first time I went over to Vancouver. I have no memorandum of that visit,

but it was about the first of the year. I think it would be in January, 1912.

Q. Now, I wish you would state what the conversation was in the store between Mr. Hackett and Mr. Sparks in regard to this payment of money, the application of payments of money, and what conversation took place?

A. We demanded the payment of the balance that was due for crushed rock on B street. The conversation was regarding the payment of that account.

Q. What was said?

A. It was stated that they were in difficulties over the street, and over the collection of the bonds, and that Mr. Miller was his attorney, and that I would have to see him in regard to the matter.

Q. Did Mr. Hackett make any statement to him in regard to the application of moneys that he had received from Rector & Daly? You heard his statement here?

A. Yes, sir.

Q. Was there any claim made?

A. I cannot be positive about any conversation in the store at that time about the application of payments. I do not remember any particular conversation taking place in the store. We presented the balance due, and there was no contention made at that time. It was simply referred to his attorney.

Q. Coming up to this conversation which took place in Mr. Miller's office, what was said there?

A. That conversation took place after the set-

tlement of this lawsuit that Blurock and Sparks had brought against the bank. We had been waiting until that case was settled, upon the understanding that when they got their bonds off the street, they would make a settlement with us. Mr. Miller and Mr. Crass both submitted statements to me that the amount of the claims were \$12,850—(interrupted)

Q. What claims?

A. Claims against the street unpaid. They put in the Wentworth claim of six thousand, the Columbia Digger Company claim of sixty-six hundred, and small claims, two hundred and fifty dollars.

Q. State what the conversation was?

A. They also gave me figures they collected \$10,887, in bonds off B street and Connecticut \$2,500, totaling \$13,387. If Mr. Miller will look at these (indicating); I think they are Mr. Crass' figures.

Q. Were those figures made at the time?

A. Yes, sir.

Q. Now, Mr. Sewall, did Mr. Hackett at that time make any statement to Mr. Miller, or to anyone there, that they had applied moneys they had received from the improvement of B street on the sand and gravel account?

A. Mr. Miller asked Mr. Hackett if it was not a fact that he had received payments that he had applied to the sand and gravel account that should have been applied to the B street account, and Mr. Hackett told him that he had an agreement with Mr. Rector that all payments made should be credited to sand and gravel, and, in pursuance to that

agreement, they had made all payments upon the sand and gravel account.

Q. Was there any statement there made by Mr. Hackett that they had received any payments from the B street improvement?

A. None whatever; there could not have been such a thing as that. I was over there to collect the balance on the B street improvement, and it was the very gist of our claim, that it was not paid.

MR. MILLER: I object to that. That is an argument that can be made to the court later on.

THE COURT: Objection sustained.

Q. Was there any statement made to Mr. Sparks by Mr. Hackett when you visited the store, that they had applied any payments from the crushed rock on the sand and gravel?

A. No, sir.

CROSS EXAMINATION.

I am one of the attorneys for the plaintiff in this suit. I think you (Mr. Miller) and myself had two conversations about this matter.

Q. In one of these conversations, we discussed the law that we thought applicable to it, as I told you what I thought our Supreme Court held on the matter?

A. Yes; but I want to correct a statement you made before the court yesterday, that you had read an authority in my presence. You did not read me any authorities, nor did you cite me any authorities. It was what we call between lawyers "jaw-bone" law.

Q. Didn't I take down a volume of 30th (36th) Washington Reports down and read the decision to you?

A. What was the case?

Q. I do not know the name.

A. I do not think you read any law. I will tell you why I do not think so, because I asked you for your authorities, and you agreed to send them to me, and never did, and I verify that from my—(interrupted)

Q. And the very reason you brought this case in this court was to get away from that authority?

A. I say positively not. I went home, after you told me that there was lots of authority to the effect that, no matter whether we knew that the money came from B street, that you could trace around through the bank and show we finally got it. I came back and hunted for the decision and went in and found our Acme case, which does not hold anything of the kind.

Q. Didn't I read to you at that time a decision from the 36th Washington?

A. I do not remember it, and I do not believe you did, because I think I would have made a memorandum of it.

Q. In a later conversation, you said I misunderstood what you people said in the office that day about an agreement you had with Mr. Rector that you should apply all of the money which you had received from Rector & Daly instead of on the unsecured claims and let the secured claims take care

of themselves, or rather went back on the bondsmen for it, and we discussed that in my office that day?

A. We talked about the application of payments.

Q. And the agreement which Mr. Hackett claimed he had with Rector & Daly, or with Mr. Rector that he might do that?

A. Yes; that the payments might be made on the sand and gravel account.

Q. There was no question but that he had received money from B street that day?

A. Absolutely, I did not know five cents came from B street; neither did Mr. Hackett.

Q. Didn't you know they had been receiving payments as far the work progressed?

A. I know that the money all came from the bank, and those funds had been comingled there, and you could not show that any payments had come from B street.

Q. You never told me anything of that kind that day?

A. That is my recollection; that has been our contention from the very start.

Q. We had before us at that time the defendants' Exhibit No. 15?

A. I could not say; I do not believe I ever saw that before.

Q. You did not?

A. I have no recollection of it.

Q. We did not have that before us at that time?

A. I have no recollection of it.

Q. In this there was no question about the application of payments at all?

A. I do not remember of ever looking at any statements. I know I took no statements over. I knew there was a balance due on this rock and they furnished me the balance due, and I went over to see whether I could not collect it from you, according to the agreement.

Testimony Closed.

The following are all the exhibits received in evidence and are marked according to their identification marks when so received in evidence.

Plaintiff's Exhibit "A"

This is a copy duly certified by the City Clerk of the City of Vancouver, Washington, of a notice, and is as follows:

Portland, Oregon, October 17, 1911.

Messrs. M. R. Sparks, C. A. Blurock, J. P. Kiggins, Mayor, and J. P. Geoghegan, Clerk, of the City of Vancouver, Clarke County, State of Washington:
GENTLEMEN:

You are hereby notified that under and by virtue of a verbal contract entered into between Rector & Daly, contractors, for the improvement of East "B" street, in the City of Vancouver, Clarke County, Washington, and the Columbia Digger Co., a corporation of the State of Oregon, under and by the terms of which the Columbia Digger Co. has furnished to the said Rector & Daly crushed rock to the amount of \$8,415.00, there is due and owing at this time from said Rector & Daly to the said Columbia

Digger Co., the sum of \$6,693.68 for the said crushed rock which was used in the improvement of said "B" street, and that they have refused and failed to pay the same or any part thereof.

COLUMBIA DIGGER CO.,

By E. A. Hackett, Secretary.

Endorsed: Claim of Columbia

Digger Co. against East "B"

Street Improvement,

Filed October 17, 1911.

(Signed) JAS. P. GEOGHEGAN,

City Clerk.

Plaintiff's Exhibit "B"

ORDINANCE No. 485.

An Ordinance fixing the amount of the bond to be given by the contractor on public works in the City of Vancouver, Washington, for the purpose of protecting material men and laborers of such contractor.

THE CITY COUNCIL OF THE CITY OF VANCOUVER DO ORDAIN AS FOLLOWS:

Section 1. Whenever a contract to do any public work on any of the streets, public buildings or elsewhere in the city of Vancouver, Washington, is made and entered into with any person, firm or corporation, and the amount of such contract is more than the sum of \$300.00, such contractor shall make and execute and deliver to the City Council of the City of Vancouver, Washington, a good and sufficient bond with two or more sureties, or with a surety company authorized to do business in the State

of Washington, as surety, conditioned that such person, firm or corporation having such contract shall faithfully perform all of the provisions of such contract, and pay all laborers and mechanics and subcontractors and material men and all persons who shall supply such person or persons or said subcontractors with provisions and supplies for the carrying on of such work, all just debts, dues and demands incurred in the performance of such work, which bond shall be by said City Council filed with the City Clerk of said City of Vancouver, Washington.

Section 2. The bond mentioned in Section 1 of this act shall be given to the City of Vancouver, Washington, and shall be in an amount not less than 50% of the full contract price of any such improvement, and all persons mentioned in Section 1 of this act shall have a right of action in his, her or their own name or names on such bond for the full amount due from such contractor for work done by such laborers or mechanics and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work or the making of such improvement.

Section 3. This ordinance shall be in force fromd and after its passage, approval by the Mayor, and publication according to law.

Read first and second times, July 7, 1909.

Read third time, July 19, 1909, and adopted by the following vote:

AYES: Councilmen Tenney, Duvoise, Greene,

Swan, McCarty and Rowley.

NAYS: None.

ABSENT: Buchanan.

Approved July 19, 1909.

(Signed) JOHN P. KIGGINS,
Mayor.

Attest:

(Signed) F. W. BIER,
City Clerk.

Plaintiff's Exhibit "C"

VANCOUVER TRUST AND SAVINGS BANK, VANCOUVER,
WASH. RECTOR & DALY.

Date	Items	Debits	Credits	Balance
1911	125			2423.68
	4			
		129.	49.40	2344.08
June 24	9c	1415.99		928.09
26	7c	616.70		311.39
26		3.55		307.84
27	7c	141.92		165.92
28	11c	1092.31	1009.85	83.46
29				
29	12c	786.56	1000.	296.90
30	16c	385.03		88.13
30			503.20	415.07
July 1	10c	267.83		147.24
3	46c	1015.64	1019.80	151.40
		49.25		
	522			
5	25c	713.83	569.25	6.82
6	23c	1334.61		1327.79
7	9c	40.41	2300.	931.80
8	5c	114.60		817.20

Date	Items	Debits	Credits	Balance
8			107.85	925.05
10	9c	28.24	64.50	961.31
10		3.		958.31
351 10	12c	939.	409.60	428.91
bal				
11		5.19		423.74
12	8c	126.59		297.15
13	10c	538.73	93.20	148.38
14	10c	522.29	7.50	663.17
15	7c	116.02	189.	590.19
17	61c	1872.24		
17	3c	103.		2565.43
		2089.40		
		23.30		
18		1618.05	2102.70	2080.78
		1298.84		
		530.70		
19	17c	399.33	1829.54	650.57
Bal. 20	8c 12.80	452.73	252.37	850.93
		107.73		
		231.40		
21	4c	42.90	351.93	541.90
22	14c	253.19		795.09
		548.20		
		198.91		
24	16c	224.78	747.11	272.76
24	5c	566.75-3	311.48	528.03
25	19c	227.74	442.56	313.21
25		6.02		319.23
26	7c	117.45-3	450.61	13.93
1911				13.93
July 27	9c	1980.54-2	1942.80	23.81
28	13c	461.31-2	384.10	101.02
	8c			

Date	Items	Debits	Credits	Balance
		2 deb.		
29	10c	2997.27		3098.29
31	4c	196.94-2	934.79	2360.44
	40.			
	18.50			
	17			
31		75.50		2435.94
	200			
	2660			
31			226.14	2209.00
Aug. 1	17c	190.88		2421.78
1	4c	21.90		2421.78
2	7c	70.35-3	4498.99	1993.14
2		19.89		2013.03
3	25c	748.97	224.45	2537.55
4	50c	966.17-2	386.59	3117.13
5	11c	187.96-3	119.29	3185.80
7	17c	308.04-2	126.04	3367.80
	Debit ck.			873.57
8	5c	1517.60-2	4011.83	
9	7c	89.30	213.50	749.37
9	4c	13.90		763.27
9		2.10		765.37
10	13c	1293.97	1397.41	661.93
11	9c	1307.80-3	1401.90	567.83
12	7c	66.70	501.95	132.58
14	11c	135.37	165.37	102.58
15	15c	1302.15		1404.73
16	14c	292.15	2047.84	350.96
17	27c	986.86-5	628.43	7.47
18			203.	195.53
18		-2	880.35	1075.88
18	Logging Camp		800.	1875.88
18	46c	1026.07		849.81

Date	Items	Debits	Credits	Balance
18	21 LC Cks.	770.95		78.86
19	4c	57.78		21.08
		28.47		
		2.15		
19		30.62		9.54
21	15c	270.99-2	278.86	1.67
		3.70		
		10.62		
21		14.32	150.	134.01
			200	
22	18c	366.70	48.87	16.18
23	14c	196.11	304.40	
23			26.08	150.55
1911	120.85			150.55
	.25			
Aug. 24		121.10		29.45
	3.			
24	8.25	11.25		18.20
24	223.20		121.25	139.45
	5.20			
25	12.47	240.87		
		83.		102.25
25		1.50		103.75
25		14.10		117.85
25			195.25	77.40
26	5c	77.20		.20
26		8.90	93.12	84.42
28	9c	96.68		12.26
28		19.50		31.76
29	5c	42.40		74.16
29			131.98	57.82
30	4c	32.15		25.67
30			166.65	
			43.25	235.57

Date	Items	Debits	Credits	Balance
31		12.90		222.67
31	4c	123.50		99.17
31		18.82		80.35
31			47.86	128.21
	25.			
Sept. 1	.90			
	38.74	25.90	137.86	102.31
	.40			
1		39.14	29.50	230.53
2	4c	61.14		161.39
5			1400.	
			244.50	
			98.42	
5	25c	548.96		1363.35
5	6c	137.		1226.35
5		24.30	28.63	1230.68
6	44c	956.10		274.58
6	4c	55.40		219.18
7	9c	45.07		174.11
7			184.77	
			17.	375.88
7		3000.	4000.	1375.88
8	4c	29.20	42.47	1346.68
8			14.	1403.15
8		81.57		1321.58
	10.			
9.	2.40	12.40		1309.18
9		3.25		1305.93
1911	5			1305.93
Sept. 9	2	12.		1293.93
	5			
9		2.52		1291.41
	18126.04			
	500		6567.12	

Date	Items	Debits	Credits	Balance
11		18626.04	11046.17	278.66
			257.51	
11			67.70	603.93
11	17c	247.99		355.94
12			413.10	769.04
12	9c	634.35		134.69
12		12.20		
		15.80	28.00	106.69
13		4.80		
		10.	14.80	132.85
13		17.95		206.79
13	Debit	200.		6.79
14	6c	101.74		94.95
14		265.		359.95
14			250.65	109.30
15	4c	90.52		199.82
16		2.12		201.94
18	16c	272.01		473.95
18	5c	84.66	134.25	424.36
18	28c	614.87		1039.23
18			1350.	310.77
19	14c	443.65	200.	67.12
		23.15		
		3.85		
19		27.00		40.12
	4.60			
	36.50			
19		41.10		.02
20	6c	141.40		142.38
		36.35		
20		14.86	51.21	193.59
	16.			
	12.			
21		28.		221.59

Date	Items	Debits	Credits	Balance
21			232.11 bal.	10.52
22		5.25		5.27
22		19.32		14.05
25	4c	12.65		26.70
25		3.		29.70
26	4c	61.30		91.00
27		2.40		93.40
Oct. 9			93.40	0.
14	1000		1022.	1022.
	22			
16		1022		0.

Plaintiff's Exhibit "D"

VANCOUVER TRUST AND SAVINGS BANK, VANCOUVER,
WASH. RECTOR & DALY.

Date	Items	Debits	Credits	Balance
Feb. 1			200.	200.
2			80.	280.
3	5	143.85		136.15
4	8	104.15		32.
6		3.40	107.50	136.10
7	3	61.21	107.	181.89
7	Int. on Daly	1.23		180.66
8		79.20		101.46
	5		31.50	132.96
	10.75			
	50			
9	25	92.55	38.75	79.16
	<hr/> 265			
10	1140	87.75	50.50	43.91
	20			
11	<hr/> 50	34.05		9.86
	1335			
14		63.35	23.10	30.39

Date	Items	Debits	Credits	Balance
			26.50	3.89
15	6	32.55	60.	23.56
16		69.30	245	226.26
			27	
17	11	287.10	185	124.15
18	10	101.25		22.91
20	11	219.49	145.15	51.42
21		4.		55.43
23	4	64.24		119.67
Bal. W			168.65	48.98
	21.95			
	9			
25		30.95	31.75	49.78
27	8	54.60		4.82
	3.95			
28	113.98	117.93	325.65	202.90
	4.40			
	29.65			
Mch. 1	43.20	77.25	146.20	271.85
2	6	255.10		16.75
		154.50		
		100.		
	3	435.	254.50	163.75
w 4	23	254.76	168.05	250.46
6	10	97.62	334.50	13.58
7	14	334.44	34.75	313.27
		10.		
8		29.05	99.05	21.
		30.		391.32
9	13.75	14.75	414.82	8.75
	1			
		110.82		
		504.		
10		330.03	35.40	

Date	Items	Debits	Credits	Balance
11	6	115.66		401.54
	13.			
	490.			
13	9-23.25	131.70	526.25	6.99
	10			
	1.20			
14	28.50	40.20	23.95	23.24
	50			
15		70.30	53.50	40.04
16	5	119.50		159.54
17	19	396.	417.	138.54
18	14	173.55	602.89	290.80
20	8	139.90	48.	198.90
21	4	123.15	31.05	106.80
22	8	301.55		194.75
23		1.75	45.95	150.55n
		101.35		251.90
24	8.75			
	10.	18.75		270.65
25	6		752.40	481.75
	6	201.90		279.85
27	9	153.30		150.60
28	10	730.90		580.30
29	7	217.40	921.25	123.55
30		103.85		19.70
			40.	59.70
31		150.		90.30
	25.	27.75	371.75	215.30w
Apl. 1	2.75			
		125.		128.70 b
3	17	310.71		182.01
4	25	393.40	234.75	340.66
5		912.25	1023.95	228.96
6	9	86.55		315.51

Date	Items	Debits	Credits	Balance
7	4	80.80	87.15	309.16
8		10.		319.16
10			101.70	217.46
10	4	183.02	1046.50	646.02
11	12	121.57	25.	549.45
12	6	468.44	40.	121.02
13	8	227.18		106.17
14	309.68			
	288.90	598.58	209.15	495.60
15			329.45	825.05
Apr. 17	21	587.61	832.	580.66
18	130.50			
18	4.50	608.35	1500.	310.99
1911	11.80			
	2.80			
	22.04			310.99
19		37.64		273.35
20	9	728.74	67.50	387.89
21	7	195.	609.	26.11
22	9	133.89		107.78
24	3	1179.53	1219.	68.31
25	7	83.86	134.80	17.37
25		5		22.37
26	9 cks.	181.07	2557.	2353.56
27	5 "	2136.40	21.85	239.01
28	6 "	187.37		51.64
29	5.			
	7.53			
	.50	13.03	29.25	67.86
May 1	16c	2892.05	3549.45	725.26
2	21c	854.69		229.43
Bal. 3	13c	169.04	923.60	625.13
4	6c	595.40	85.95	115.68
5	6c	556.59	620.50	179.59

Date	Items	Debits	Credits	Balance
6	12c	156.70		22.89
8	7c	48.	1115.	13.96
8	2.88			
	3.50	6.33		20.29
8			67.15	46.86
9	6c	23.76	13.75	36.85
10	175.10			
	14.15	189.25	25.82	126.58
11	5c	685.31	1000.	188.11
12		33.	1109.36	1264.47
	10			
13	20	30.	163.20	1397.67
15		7.75	500.	1889.92
15	9			
	17.50			
	10.41	36.91		1853.01
16	8c	310.76		1542.25
16		19.21		1523.04
17	30c	1868.13	504.40	159.31
18	24c	577.34	500.	81.97
19	10c	495.39	500.	86.58
19			35.	121.58
20	6c	92.03	97.	126.55
22	7c	150.16	1214.	1190.39
23	6c	55.04		1135.35
25	10c	953.04		182.31
25	1.90			
	1.90	3.80		178.51
26	12.			
	10.			
	35.84	57.84		120.67
26		3265.83	3512.25	367.09
27	12c	93.46	14.10	287.73
27		42.87		244.86

Date	Items	Debits	Credits	Balance
29	9c	42.72		202.14
29		27.56		174.58
31	15	731.87	373.91	
31	7c	64.75		248.13
31			250.	Bal. 1.87
June 1	4c	43.80	50.	8.07
1		1.65		
		.95		
		.95	3.55	4.52
2	5c	57.25	193.70	140.97
3	11c -2D	304.18	1242.25	1079.04
		37.65		
5	44c 320.	940.02	413.40	552.42
		55.		
6	31c 5	1109.72	600.	42.70
		6252.55		
7	8c	6104.	6257.55	196.25
8	9c	1329.50	399.24	734.01
8		194.40	1420.40	491.99
9	16c	473.15		18.84
		35.55		
10	10c	221.31	399.65	197.18
12	11c 106.30	330.50	135.85	2.53
12		50.	84.71	37.24
13	8c	55.10	10.50	7.36
14	6c	118.47	3000.	2874.17 B
15	8c	2875.91		1.74
16	9c	202.26	1000.	796.
16	4c	504.55	1001.65	1293.10
17	21c	768.64		524.46
19	25c	6610.84	6552.31	465.93
19	4c	33.65	17.75	450.03
20	32c	729.65		279.62

Date	Items	Debits	Credits	Balance
	42.33			
20	2.	46.58	1477.12	1150.92
21	14c	237.66		913.26
21		29.10		884.16
22	11c	971.91	46.43	41.32
23	11c	4420.75-2	6885.75	2423.68

Defendant's Exhibit No. 1.

Rector & Daly, Vancouver, Wash., Aug 8, 1911,
No. 1859.

Pay to the order of Columbia Digger Co. \$1216.25
Twelve Hundred and Sixteen and 25/100 Dollars
To Vancouver Trust & Savings Bank, Vancouver,
Wash.

RECTOR & DALY.

7/5—483 y C Rock	603.75
7/6—490 “ “ “	612.50
	<hr/>
	1216.25

Defendant's Exhibit No. 2.

Rector & Daly, Vancouver, Wash., Oct. 10, 1911.
No. 2408.

Pay to the order of Columbia Digger Co. \$1000.00
One Thousand and 00/100 Dollars
To Vancouver Trust & Savings Bank, Vancouver,
Wash.

RECTOR & DALY.

Defendant's Exhibit No. 3.

Rector & Daly, Vancouver, Wash., July 10, 1911.

No. 1272.

Pay to the order of the Columbia Digger Co. \$649.25

Six Hundred Forty-nine and 25/100 Dollars.

To Vancouver Trust & Savings Bank, Vancouver,
Wash.

RECTOR & DALY.

530 yd. Rock at 1.25 662.50

Less 2% 15.25

649.25

Defendant's Exhibit No. 4.

Rector & Daly, Vancouver, Wash., July 17, 1911.

No. 1480.

Pay to the order of Columbia Digger Co. \$859.90

Eight Hundred Fifty-nine and 90/100 Dollars

To Vancouver Trust & Savings Bank, Vancouver,
Wash.

(On account)

RECTOR & DALY.

Defendant's Exhibit No. 5.

Rector & Daly, Vancouver, Wash., July 5, 1911.

No. 1242.

Pay to the order of Columbia Digger Co. \$1017.49

Ten Hundred Seventeen and 49/100 Dollars

To Vancouver Trust & Savings Bank, Vancouver,
Wash.

RECTOR & DALY.

5/22—389.6 yd. Rock

5/23—441. “ “

Defendant's Exhibit No. 6.

Rector & Daly, Vancouver, Wash., Sept. 6, 1911.
No. 2146.

Pay to the order of Columbia Digger Co. \$3000.00
Three Thousand and 00/000 Dollars
To Vancouver Trust & Savings Bank, Vancouver,
Wash.

(Ins. Funds.)

RECTOR & DALY.

Defendant's Exhibit No. 7.

Rector & Daly, Vancouver, Wash., June 23, 1911.
No. 1101.

Pay to the order of Columbia Digger Co. \$501.64
Five Hundred One and 64/100 Dollars
To Vancouver Trust & Savings Co., Vancouver,
Wash.

409.5 yds. Crushed
Rock.

RECTOR & DALY.

Less 2%.

Defendant's Exhibit No. 8.

To the Mayor and City Clerk
and City Treasurer and Common Council
of the City of Vancouver, Washington:—

YOU AND EACH OF YOU will please take notice that the undersigned who hold a contract with the City of Vancouver, Washington, for the improvement of East "B" Street therein, which contract was and is made pursuant to the terms and provisions of and by authority of Ordinance No. 533, which was adopted by the said City on the 15th day of Aug. 1910, and which was passed for

the purpose of creating and which did create improvement district No. 58, and which contract bears date the 6th day of May, 1911, have sold, assigned, transferred and set over to the Vancouver Trust & Savings Bank, all of the sums of money warrants, bonds or estimates due or to become due the undersigned under the terms and provisions of said contract.

AND YOU AND EACH OF YOU are hereby directed to pay and deliver to the order of the Vancouver Trust & Savings Bank, all the sum or sums of money, cash or warrants or bonds and estimates for the principal sum, or the interest thereon due or to become due the aforesaid Rector & Daly under the terms of said contract, and in the manner as in said contract provided, which is by you received, as aforesaid, for any and all, in whole or part payment of assessments made against any and all property in said improvement district No. 58, or abutting on said East "B" Street, between the points to be improved, and this order is to notify you and each of you that the same is to continue until the further order of the Vancouver Trust & Savings Bank, with reference to any settlement or assessments paid or to be paid, and until all assessments on said East "B" street, and in said improvement district No. 58, arising by reason of said improvement, are paid in full, with the principal and interest thereon, and the production of evidence by you of having delivered the cash or money or warrants or bonds to the said Vancouver

Trust & Savings Bank, in payment of the obligation of said improvement district for the said improvement, so made by us, shall be conclusive evidence of your discharge on said contract obligation, so far as we are concerned.

Dated at Vancouver, Washington this 7th
day of June, 1911.

(Rector and Daly	RECTOR & DALY,
Transfer of	By A. B. Rector, Mag.
payment—East "B" Street	
to	
Vancouver Trust Savings Bank	

FILED

June 7th, 1911,

Jas. P. Geoghegan,
City Clerk.)

Defendant's Exhibit No. 9.

Vancouver, Washington, Aug. 8, 1911.

The Treasurer of the City of Vancou- \$10,046.17
ver will pay to Rector and Daly (assigned to Van-
couver Trust & Savings Bank) or order, the sum of
Ten Thousand Forty-six and 17/100 Dollars out of
the Improvement Dist. No. 58 Fund; allowed by the
City Council Aug. 7, 1911. For cash paid into
East "B" St. Assignment.

Attest: Jas. P. Geoghegan,
City Clerk.

JOHN P. KIGGIN,
Mayor.

Defendant's Exhibit No. 10.

City of Vancouver, Washington,
Office of City Clerk.

Vancouver, Wash.

August 9th, 1911.

Received of Jas. P. Geoghegan, City Clerk, Bonds
No. 1 and 2 of Local Improvement District No. 58,
East "B" Street in amount of \$500.00 each total
\$1000.00.

VANCOUVER TRUST & SAVINGS BANK,

By Milton Evans,
a Cashier.

Defendant's Exhibit No. 11.

City of Vancouver, Washington,
Office of City Clerk.

Vancouver, Wash.

September 7th, 1911.

Received of Jas. P. Geoghegan, City Clerk, Bonds
of Local Improvement District No. 58, East B
Street, Numbers 3 to 17 inclusive, amounting to
\$7,500.00.

VANCOUVER TRUST & SAVINGS BANK,

Milton Evans,
a Cashier.

Defendant's Exhibit No. 12.

City of Vancouver, Washington,
Office of City Clerk.

Vancouver, Wash.

October 7th, 1911.

Received of Jas. P. Geoghegan, City Clerk, Bonds

numbered 18 to 23 inclusive, in denomination of \$500.00 each, amounting to \$3,000.00.

VANCOUVER TRUST & SAVINGS BANK,

By Milton Evans,

a Cashier.

Defendant's Exhibit No. 13.

\$4000.00 Vancouver, Washington, Sept. 7, 1911.

ON DEMAND after date, without grace, for value received, I promise to pay to the order of VANCOUVER TRUST AND SAVINGS BANK, of Vancouver, Washington,

FOUR THOUSAND AND NO/100 DOLLARS

in gold coin of the United States of America, with interest at 8 per cent per annum from date until maturity, and one per cent per month from maturity until paid, payable quarterly, and if any part of this note or interest be not paid when due, it shall cause the whole to become due and payable at once, without further notice, and I agree to pay Ten Dollars as fees for collecting the same, provided the same is placed in the hands of an attorney for collection and is collected by such attorney, without suit or action, but in case suit or action shall be brought to collect principal or interest, I promise to pay such additional sum as the Court shall adjudge reasonable as attorney's fees in said suit or action, which fee shall be taxed as part of the costs in the judgment recovered. The makers, endorsers and guarantors of this note hereby severally waive presentment for payment, notice of non-payment, protest and notice of protest and diligence in

bringing suit against any parties thereto, and sureties consent that the time of payment may be extended from time to time without notice thereof.

P. O. Address..... RECTOR & DALY,
No. 1023. Due..... By A. B. Rector.

(On the back of above note.)

For value received I hereby guarantee the payment of the principal of within note, and the interest and attorney's fees therein provided for, at maturity; and at any time thereafter, until paid, and I hereby waive demand of payment, presentation for payment, notice of non-payment and notice of protest.

B VANCOUVER TRUST & SAVINGS BANK

By E. F. Bonton, Pres.

Endorsement on		Balance due on
Principal		Principal
Sept. 13-11	\$200.00	\$3800.00
October 7-11	1166.60	2633.40
July 30, 1912	503.80	2129.60

Defendant's Exhibit No. 14.

Vancouver, Wash., April 1st, 1911.

The City of Vancouver

To Rector & Daly, Contractors, Dr.

To work done on Improvement Dist. No. 58

(E. "B" St.) during month of March, 1911 \$1270.00

O. K.

H. H. Lotter, C. E.,
City Engineer.

CLAIM OF

Rector & Daly, Contractors,
\$1270.00

For work done on Imp. Dist. No.58
during month of March, 1911.

OnFUND

I hereby certify that the within
claim is correct and just.

JOHN RANSCH

Filed Apr. 3, 1911.

Jas. P. Geoghegan,
City Clerk,

Audited and Allowed.....

.....19.....for \$.....

by the Committee on Accounts and
Current Expenses.

W. TENNY,
Chairman.

Vancouver, Washi, Dec. 1, 1911.

THE CITY OF VANCOUVER

To Rector & Daly——Dr.

or their successors or assigns.

To final payment on Imp. Dist. No. 58 (E. "B" St.) :
\$8732.35

Total work done.....\$33180.15

Vouchers issued before..... 2447.80

Balance due\$8732.35

An amt. sufficient to make needed repairs
should be withheld for a month or two until
final acceptance.

O. K. H. H. Lotter, C. E.

City Engineer.

CLAIM OF

Rector & Daly, their successors or assigns.

\$8732.35

For final payment on Dist. No. 58 (E. "B" St.)

On FUND

I hereby certify that the within claim is correct and just.

Filed Dec. 4, 1911.

Jas. P. Geoghegan, City Clerk.

Vancouver, Wash. Nov. 1911

THE CITY OF VANCOUVER

To Rector & Daly—————Dr.

To work done on Imp. Dist. No. 58 (E. "B" St.) during Oct. 1911	2108.00
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O. K. H. H. Lotter, C. E.

City Engineer.

CLAIM OF

RECTOR & DALY

\$2108.00

For work done on Imp. dist. No. 58 (E. "B" St.) during Oct. 1911.

OnFUND

I hereby certify that the within claim is correct and just.

JOHN RANSCH.

Filed November 6, 1911,

Jas. P. Goeghegan,

City Clerk.

Audited and allowed.....191.....for \$.....

By the Committee on Accounts and Current Expenses.

J. G. WINTERS,
Chairman.

Vancouver, Wash., Oct. 2nd, 1911.

The City of Vancouver,

To Rector & Daly—————Dr.

To work done on E. "B" St. Dist. No. 58 during mo.
of Sept. 1911. \$3255.97

Total amount vouchered to date..\$22339.80

O. K. H. H. Lotter, C. E.

City Eng.

(On the back of claim.)

(BONDS)

Claim of
Rector & Daly
\$3255.97

For work on E. "B" St. Imp. Dist. No. 58 done during Sept. 1911.

OnFUND. I hereby certify
that the within claim is correct and just.

W. TENNEY,

Filed Oct. 2, 1911, Jas. P. Geoghegan, City Clerk.
Audited and allowed Oct. 2, 1911, by the Committee
on Accounts and Current Expenses.

W. TENNEY,
Chairman.

Vancouver, Wash., Sept. 1st, 1911.

THE CITY OF VANCOUVER,

To Rector & Daly—————Dr.

To work done on Imp. Dist. No. 58 (E. "B" St.)
during August, 1911. \$7713.83

O. K., H. H. Lotter, C. E.,
City Engineer.

Total vouchers to date \$19083.83.

(On the back of claim.)

CLAIM OF
RECTOR & DALY
\$7713.83

For work done Imp. Dist. No. 58
(E. "B" St.) during August, 1911.
OnFUND
I hereby certify that the within
claim is correct and just.

JOHN RANSCH.

Filed Sept. 4, 1911.

Jas. P. Goeghegan,
City Clerk.

Audited and allowed (BONDS)
.....191.....for \$7713.83
by the Committee on Accounts and
Current Expenses.

W. TENNEY, Chairman

Vancouver, Wash. Aug. 1st, 1911.

THE CITY OF VANCOUVER

To Rector & Daly, Contractors, Dr.

To work done during July, 1911, on Imp.
Dist. No. 58 (E. "B" St.) \$3300.00

Amt. total vouchers to date including this one
\$11370.00

Work done up to Aug. 1st, 1911	14,206.55
20%	2,841.31

Bal.	11,365.24
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O. K H. H. Lotter, C. E.,
City Engineer.

Total 11,370.00

Cash 10,046.17

Bonds 1,000.00

11,046.17	11,046.17
-----------	-----------

323.83

(On the back of claim)

CLAIM OF RECTOR & DALY, CONTRACTORS
\$3300.00

For work done on E. "B" St. Ipm. Dist. No. 58 during July, 1911

on FUND

I hereby certify that the within claim is correct and just.

JOHN RANSCH.

Filed Aug. 7, 1911.

Jas. P. Geoghegan, City Clerk.

Audited and allowed (Pay in Bonds)

by the Committee on Accounts and Current Expense.

W. TENNEY, Chairman.

Vancouver, Wash., May 1st, 1911.

THE CITY OF VANCOUVER

To Rector & Daly, Contractors, Dr.

To work done on E. "B" St. Imp.

Dist. No. 58, during month of

April, 1911\$2000.00

Work done to May 1st....\$3347.59

“ “ “ April 1st.... 1270.00

“ “ “ May 2077.59

O. K. H. H. Lotter, C. E.,

City Engineer.

CLAIM OF

Rector & Daly, Contractors,

\$2000.00

For work done on E. “B” St. Imp.

Dist. No. 58, during April 1911.

OnFund

I hereby certify that the within
claim is correct and just.

JOHN RANSCH.

Filed May 1, 1911.

JAS. P. GOEGHEGAN,

City Clerk.

Audited and allowed.....

.....19.....for \$.....

by the Committee on Accounts and
Current Expenses.

W. TENNEY, Chairman.

Vancouver, Wash, July 1, 1911.

THE CITY OF VANCOUVER

To Rector & Daly, Contractors, Dr.

For work done on Imp. Dist. No. 58, E. “B” St.

during the month of June, 1911 \$2300.00

Vouchers to June 1st, incl. \$5770.00

Amount of this voucher.. 2300.00

Total to date\$8070.00

O. K H. H. Lotter, C. E.,
City Engineer.

CLAIM OF
Rector & Daly, Contractors,
\$2300.00

For work done during June, 1911
on Imp. Dist. No. 58, E. "B" St.
onFund

I hereby certify that the with-
in claim is correct and just.

JOHN RANSCH.

Filed July 3, 1911,
Jas. P. Geoghegan,
City Clerk.

Audited and allowed.....191..
for \$.....by the Com-
mittee on Accounts and Current
Expenses.

JOHN G. WINTERS, Chairman.

(Paid by Bond)

Vancouver, Wash., June 5th, 1911.

THE CITY OF VANCOUVER

To Rector & Daly, Contractors, Dr.

To work done on E. "B" St. Imp. Dist. No. 58,
during month of May, 1911, \$2500.00

Total to date:

Voucher of Apr. 1st..... 1270.00

" " May 1st..... 2000.00

“ “ June 1st..... 2500.00

Total..... 5770.00

O. K. H. H. Lotter, C. E.,

City Engineer.

CLAIM OF

Rector & Daly, Contractors,

\$2500.00

For work done on Imp. Dist.
No. 58 E. “B” St. month of May,
1911.

OnFund

I hereby certify that the within
claim is correct and just.

JOHN RANSCH.

Filed June 5, 1911,

Jas. P. Geoghegan,

City Clerk.

Audited and allowed.....
19....for.....by the Com-
mittee on Accounts and Current
Expenses.

W. TENNEY,

Chairman.

Plaintiff's Exhibit No. 15.

STATEMENT.

Portland, Oregon, Dec. 30, 1911.

RECTOR & DALY,

Vancouver, Wn.,

in account with

COLUMBIA DIGGER COMPANY.

Phones: A 1997

Main 997 ANKENY STREET DOCK

1911 Balance

May 11	Bill Rendered	216.60	
12	"	293.60	
22	"	240.10	
"	By Check		240.10
June 13	"	501.64	
14	"	12.50	
19	" "		501.64
21	"	477.26	
22	" Cr. Memo		16.25
"	" Check		157.75
"	"	266.40	
23	"	540.23	
26	" "		1017.49

2548.33 1933.23

Balance Forward 615.10

STATEMENT.

Portland, Oregon, Dec. 30, 1911.

Rector & Daly,

Vancouver, Wn.,

in account with

COLUMBIA DIGGER COMPANY

Phones: A 1997

Ankeny Street Dock

Main 977

(Sand and Gravel Ap.)

1911

June 26 Balance 615.10

	29	Bill Rendered	244.80	
	"	By Check & Discount		662.50
July	8	"	321.60	
	8	"	281.60	
	9	"	202.20	
	9	"	538.00	
	11	"	379.65	
	11	"	211.00	
	12	By Check		300.00
	15	" "		859.90
	17	Bill Rendered	501.60	
	18	"	552.50	
	30	"	284.00	
Aug.	3	By Check		1216.25
	10	Bill Rendered	282.40	
	11	"	189.50	
	15	By Cr. Memo.		40.80
	16	Bill Rendered	272.80	
	17	"	214.00	
	19	"	277.60	
	27	"	269.60	
	28	By check dated and payable Sept. 3		3000.00
	29	Bill Rendered	186.00	
	31	"	472.40	
Sept.	6	"	322.40	
	10	"	299.00	
	12	"	3.00	
	20	"	250.40	
	21	"	200.00	
	27	"	264.80	

		<i>M. R. Sparks and G. A. Blurock.</i>	183
	“	By Discount	5.00
	“	“ Check	250.00
Oct.	2	Bill Rendered	180.00
	4	By Discount	3.60
	4	“ Check	176.40
	11	“ “	1000.00
	30	“ “	450.00
Dec.	1	“ Cr. Memo.	10.20.

7815.95	7974.65
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Balance Cr. to Cr. Rock Ap. 158.70

7974.65	7974.65
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STATEMENT.

Portland, Oregon, Nov. 1, 1911.

RECTOR & DALY,

Crushed Rock Ap.

Vancouver, Wn.,

in account with

COLUMBIA DIGGER COMPANY

Phones: A. 1997

Ankeny Street Dock

Main 997

Oct. 1	Balance	7693.68
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“ 11	By Cash	1000.00
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6693.68

Plaintiff's Exhibit No. 16.

STATEMENT

Portland, Oregon, Dec. 30, 1911.

Rector & Daly,

Vancouver, Wash.

Crushed Rock Ap. as used on "B" Street
in account with

COLUMBIA DIGGER COMPANY

Phones: A. 1997

Ankeny Street Dock

Main 997

1911

	Balance		
June 25	Bill Rendered 530.0 yds. at 1.25	662.50	
July 5	973.0 "	1216.25	
Aug. 1	478.7 "	598.38	
10	401.0 "	501.25	
22	380.0 "	475.00	
23	445.6 "	557.00	
29	336.0 "	420.00	
Sept. 2	384.0 "	480.00	
4	370.0 "	462.50	
24	401.4 "	501.75	
26	402.0 "	502.50	
27	380.2 "	475.25	
		<hr/>	6852.38
	Balance from Sand and Gravel Acc.		158.70
		<hr/>	6693.68

Before the court had made its findings of fact and conclusions of law and its final decision herein, the plaintiff duly requested the court to make each of the following findings of fact, numbered from II to XXXIX, both inclusive, and each of the following conclusions of law from I to VI, both inclusive, and the court separately refused to find each one of said findings of fact and conclusions of law,

and to each refusal of the court to make said findings of fact and conclusions of law, the plaintiff separately excepted and the court allowed a separate exception to each refusal of the court to find as aforesaid.

Findings of Fact.

I.

That the defendants, Rector & Daly, have paid the plaintiff upon account of their claim for crushed rock the sum of \$662.50, the same being paid by check for \$649.25 and by discount allowed the plaintiff of the sum of \$13.25.

II.

That said Rector & Daly have made no other payments on account of the plaintiff's claim.

III.

That the balance due plaintiff from said Rector & Daly on account of said crushed rock at the time of the commencement of this action was the sum of \$6,189.88.

IV.

That the payment of \$1,017.49 made by said Rector & Daly to the plaintiff by check dated July 5, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to

said plaintiff on account of the indebtedness of said Rector & Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

V.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

VI.

That the note for \$2,300.00 discounted by said bank in connection with the payment of said check for \$1,017.49 was not given by said Rector & Daly or discounted by said bank against the moneys to be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

VII.

That said check for \$1,017.49 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

VIII.

That the plaintiff had no knowledge that the said check for \$1,017.49 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement

of street "B," and had no knowledge or notice of any equity of the defendants, Sparks & Blurock, as sureties to have the said money applied upon the account for crushed rock.

IX.

That the payment of \$1,216.25 made by said Rector & Daly to the plaintiff by check dated August 8, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to said plaintiff on account of the indebtedness of said Rector & Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

X.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

XI.

That the note for \$1,306.00 discounted by said bank in connection with the payment of said check

for \$1,216.25 was not given by said Rector & Daly or discounted by said bank against the moneys to be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

XII.

That said check for \$1,216.25 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

XIII.

That the plaintiff had no knowledge that the said check for \$1,216.25 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement of street "B," and had no knowledge or notice of any equity of the defendants, Sparks & Blurock, as sureties to have the said money applied upon the account for crushed rock.

XIV.

That the payment of \$3,000.00 made by Rector & Daly to the plaintiff by check dated September 6, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to said plaintiff on account of the indebtedness of said Rector &

Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

XV.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

XVI.

That the note for \$4,000.00 discounted by said bank in connection with the payment of said check for \$3,000.00 was not given by said Rector & Daly or discounted by said bank against the moneys to be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

XVII.

That said check for \$3,000.00 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

XVIII.

That the plaintiff had no knowledge that the said check for \$3,000.00 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement of street "B," and had no knowledge or notice of any equity

of the defendants, Sparks and Blurock, as sureties to have the said money applied upon the account for crushed rock.

XIX.

That the payment of \$859.90 made by said Rector & Daly to the plaintiff by check dated July 11, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to said plaintiff on account of the indebtedness of said Rector & Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

XX.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

XXI.

That the note for \$2,079.40 discounted by said bank in connection with the payment of said check for \$859.90 was not given by said Rector & Daly or discounted by said bank against the moneys to

be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

XXII.

That said check for \$859.90 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

XXIII.

That the plaintiff had no knowledge that the said check for \$859.90 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement of street "B," and had no knowledge or any notice of any equity of the defendants, Sparks and Blurock, as sureties to have the said money applied upon the account for crushed rock.

XXIV.

That the payment of \$501.64 made by said Rector & Daly to the plaintiff by check dated June 23, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to said plaintiff on account of the indebtedness of said Rector & Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

XXV.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

XXVI.

That the note for \$5,770.00 discounted by said bank in connection with the payment of said check for \$501.64 was not given by said Rector & Daly or discounted by said bank against the moneys to be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

XXVII.

That said check for \$501.64 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

XXVIII.

That the plaintiff had no knowledge that the said check for \$501.64 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement of street "B," and had no knowledge or notice of any equity of the defendants, Sparks and Blurock, as sureties to

have the said money applied upon the account for crushed rock.

XXIX.

That the payment of \$1,000.00 made by said Rector & Daly to the plaintiff by check dated October 10, 1911, upon the Vancouver Trust & Savings Bank was made out of moneys to their credit in said bank, and that said payment was not applied by said Rector & Daly upon their indebtedness to plaintiff for said crushed rock, but was applied by plaintiff with the consent of said Rector & Daly upon the indebtedness of said Rector & Daly to said plaintiff on account of the indebtedness of said Rector & Daly to said plaintiff for sand and gravel sold and delivered by plaintiff to said Rector & Daly.

XXX.

That the said account, out of which said check was paid, was the general checking account of said Rector & Daly in said bank, in which said Rector & Daly from time to time made deposits in the general course of their business, and that some of their said deposits in said account were the proceeds of notes given by them to said bank and discounted by said bank and placed to their credit in said account.

XXXI.

That the note for \$1,022.00 discounted by said bank in connection with the payment of said check for \$1,000.00 was not given by said Rector & Daly or discounted by said bank against the moneys to

be paid from said city to said Rector & Daly on account of the improvement of East "B" street.

XXXII.

That said check for \$1,000.00 was not paid by said bank out of any moneys received by said Rector & Daly from said city on account of the improvement of said street "B."

XXXIII.

That the plaintiff had no knowledge that the said check for \$1,000.00 was paid or to be paid out of any moneys received by Rector & Daly from the said city or derived in any manner from, or having any connection with, the said improvement of street "B," and had no knowledge or notice of any equity of the defendants, Sparks and Blurock, as sureties to have the said money applied upon the account for crushed rock.

XXXIV.

There is no competent evidence to show that the check for \$1,017.49 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

XXXV.

There is no competent evidence to show that the check for \$1,216.00 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

XXXVI.

There is no competent evidence to show that the

check for \$3,000.00 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

XXXVII.

There is no competent evidence to show that the check for \$1,000.00 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

XXXVIII.

There is no competent evidence to show that the check for \$859.90 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

XXXIX.

There is no competent evidence to show that the check for \$501.64 was paid out of moneys received by Rector & Daly from or on account of said street improvement "B," or in any manner derived therefrom or having any connection therewith.

Conclusions of Law.

I.

That the application of the payments represented by the six checks set forth in these proposed findings by the plaintiff with the consent of Rector & Daly to the indebtedness of Rector & Daly to the plaintiff for sand and gravel was a lawful application of said payments and binding upon the defendants,

Sparks and Blurock, without any reference to the source from which said moneys came, and without any reference to the knowledge of the plaintiff of the source from which said moneys came.

II.

The defendants, Sparks & Blurock, have no right to set aside the application of payments made by the plaintiff with the consent of said Rector & Daly.

III.

That the defendants, Sparks & Blurock, have no right to challenge the application of said payments by the plaintiff with the consent of Rector & Daly without proving that the moneys used in making such payments was moneys derived by Rector & Daly under their contract with the city for the improvement of East "B" street, and without also proving that the plaintiff knew at the time said payments were so applied that the moneys with which said payments were made were received by said Rector & Daly under said contract for the improvement of East "B" street.

IV.

That the answer does not allege that plaintiff had knowledge that the moneys so applied were received by said Rector & Daly under said contract for the improvement of East "B" street, and that, therefore, no finding of knowledge can be made by the court under the pleadings.

V.

That the burden is upon the said defendants, Sparks & Blurock, to clearly trace the moneys which

said Sparks & Blurock seek to have applied upon the indebtedness to plaintiff, but said Sparks and Blurock have no right to insist upon the application of said payments upon the indebtedness for crushed rock.

VI.

That said defendants have no right in an action at law to set aside said application of payments, but that their only remedy, if any, is in a court of equity.

Before the court made its findings herein, the plaintiff duly objected to the court's making the eleventh finding of fact proposed by the defendant, and also to the court's making said finding, on the ground and for the reason that the moneys paid by said checks were not realized from the improvement of said East "B" street, and were not the same moneys for the collection and payment of which the defendants, Sparks and Blurock, were sureties. The said objection was overruled and the court made the eleventh proposed finding, to which action of the court plaintiff duly excepted, and said exception was duly allowed by the court.

The foregoing bill of exceptions contains all of the testimony, evidence and exhibits received upon the trial of this action, and all the objections made, rulings of the court and exceptions of the plaintiff, and all of the requests of the plaintiff for findings of fact and rulings upon questions of law with the rulings of the court upon said requests and the exceptions allowed to plaintiff and the objections of

the plaintiff to the proposed findings of defendants and the ruling of the court thereon, and the exception of plaintiff to said ruling.

And plaintiff prays that this, its bill of exceptions, may be allowed, settled and signed by the Judge who tried this action.

The foregoing bill of exceptions was duly presented for settlement within the time for settlement thereof, as fixed by order of the court, based upon the stipulations of the parties, and said bill of exceptions being in conformity with the truth, the said foregoing matter is hereby allowed, settled and signed as and for the bill of exceptions in this case this 10th day of November, 1914, in open court, and the same is hereby made a part of the record herein. Said bill of exceptions contains all the testimony, evidence and exhibits in the case.

EDWARD E. CUSHMAN,

United States District Judge

For the District of Washington.

(Duly filed).

Assignment of Errors.

Comes now the plaintiff by Giltner & Sewall and Guy C. H. Corliss, its attorneys, and says that in the records and proceedings in the above entitled action there is manifest error, and said plaintiff now files the following Assignment of Errors, upon which it will rely on the prosecution of the writ of error in the above entitled cause.

I.

The Court erred in overruling plaintiff's objection to Defendants' Exhibit No. 8, and in receiving said exhibit in evidence.

II.

The Court erred in overruling plaintiff's objection the following question asked the witness, A. B. Rector, on cross examination:

"Q. Doesn't it appear from your own books that you were receiving crushed rock from these people on the 9th of October?"

III.

The Court erred in overruling plaintiff's objection to Defendants' Exhibit No. 9, and in receiving said exhibit in evidence.

IV.

The Court erred in overruling plaintiff's objection to Defendants' Exhibit No. 10, and in receiving the same in evidence.

V.

The Court erred in overruling plaintiff's objection to Defendants' Exhibit No. 11, and in receiving the same in evidence.

VI.

The Court erred in denying plaintiff's motion to strike out as follows:

"I move to strike out all of that testimony in regard to the application—the testimony given with regard to the security for these notes and the application of the moneys, derived from different sources for the payment of these notes, because the testi-

mony is hearsay, and he is not able to testify of his own knowledge of any particular item, except what he was told."

VII.

The Court erred in refusing to make plaintiff's second proposed finding of fact.

VIII.

The Court erred in refusing to make plaintiff's third proposed finding of fact.

IX.

The Court erred in refusing to make plaintiff's fourth proposed finding of fact.

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The Court erred in refusing to make plaintiff's fifth proposed finding of fact.

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XIII.

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The Court erred in refusing to make plaintiff's tenth proposed finding of fact.

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The Court erred in refusing to make plaintiff's fifteenth proposed finding of fact.

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XXXI.

The Court erred in refusing to make plaintiff's twenty-sixth proposed finding of fact.

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The Court erred in refusing to make plaintiff's twenty-seventh proposed finding of fact.

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XLV.

The Court erred in refusing to make plaintiff's first proposed conclusion of law.

XLVI.

The Court erred in refusing to make plaintiff's second proposed conclusion of law.

XLVII.

The Court erred in refusing to make plaintiff's third proposed conclusion of law.

XLVIII.

The Court erred in refusing to make plaintiff's fourth proposed conclusion of law.

XLIX.

The Court erred in refusing to make plaintiff's fifth proposed conclusion of law.

L.

The Court erred in refusing to make plaintiff's sixth proposed conclusion of law.

LI.

The Court erred in overruling plaintiff's objection to defendants' proposed finding of fact and in making said finding of fact.

LII.

The Court erred in making its first conclusion of law.

LIII.

The Court erred in making its second conclusion of law.

LIV.

The Court erred in making its third conclusion of law.

LV.

The Court erred in rendering judgment in favor of the defendants, dismissing the action with costs.

WHEREFORE, Plaintiff prays that said judgment of the District Court of the United States, for the Western District of Washington, Southern Division, be reversed, and for such other relief as may be proper in the premises.

Dated this November 7th, 1914.

GILTNER & SEWALL,
GUY C. H. CORLISS,
Attorneys for Plaintiff.

(Duly filed).

Petition for Writ of Error, with bond for the prosecution of the writ to effect in the sum of Five Hundred (\$500.00) Dollars, the bond being signed by M. A. Hackett and E. A. Hackett as sureties thereon.

Writ of Error duly issued and citation duly issued and served.

This record is printed pursuant to a stipulation of the parties to the cause by their attorneys of record.

Clerk's Certificate.

UNITED STATES OF AMERICA,)
WESTERN) ss.
DISTRICT OF WASHINGTON,)

I, FRANK L. CROSBY, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the above entitled cause as the same remains of record and on file in my office in said district at Tacoma, and that the same constitutes

the return on the annexed Writ of Error.

I further certify that I attached hereto and herewith transmit the original Writ of Error and original Citation, and original order extending time on Writ of Error.

I further certify that the following is a full, true and correct statement of all expenses, costs and fees, and charges incurred and paid in my office by and on behalf of the Plaintiff in Error, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fees (Sec. 828 R. S. U. S.)	
for making record, certificate or return, 461 folios @ 15c.....	\$69.15
Certificate of Clerk to transcript of record, etc. 2 folios @ 15c30
Seal to said certificate20
Statement of the cost of printing said transcript of record, collected and paid,	\$214.00

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Tacoma, in said District, this 2nd day of January, 1915.

(Seal)

FRANK L. CROSBY, Clerk,

By E. C. ELLINGTON,
Deputy Clerk.

No. 2560

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

COLUMBIA DIGGER COMPANY,
a Corporation,
Plaintiff in Error,

vs.

M. R. SPARKS and
C. A. BLUROCK,
Defendants in Error.

WRIT OF ERROR

To the District Court of the United States for the
District of Washington.

BRIEF OF PLAINTIFF IN ERROR.

R. R. GILTNER,
RUSSELL E. SEWALL,
GUY C. H. CORLISS,
Attorneys for Plaintiff in Error.

Filed

FEB 4 - 1915

F. D. Monckton,

IN THE
UNITED STATES CIRCUIT COURT
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COLUMBIA DIGGER COMPANY,
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Plaintiff in Error,

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M. R. SPARKS and
C. A. BLUROCK,
Defendants in Error.

WRIT OF ERROR

To the District Court of the United States for the
District of Washington.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error was the plaintiff in the court below, and therefore in this brief the parties will be designated as plaintiff and defendants.

By this writ of error the plaintiff seeks to review a judgment in favor of the defendants rendered by the District Court for the State of Washington in an action at law. The case was tried be-

fore the court without a jury, the parties having in conformity with the statute made and filed a written stipulation waiving a jury trial. Transcript, pp. 21-22-27.

The court made its findings of fact and conclusions of law and upon the basis thereof rendered final judgment in favor of the defendants dismissing the action. Transcript, p. 27.

The action is upon a bond given by Rector and Daly, contractors, and these defendants, as sureties under the Washington statute. Rector and Daly on the 6th of May, 1911, entered into a contract with the City of Vancouver, Washington, for the improvement of East B Street in such city. The bond sued upon was given in compliance with the Washington statute for the security of such persons as should furnish labor and materials to the contractors in the making of such street improvements. Secs. 1159 to 1161, Rem. & Bal. Code of Wash. The contract and bond are attached to the complaint as exhibits and their execution is admitted. The plaintiff's cause of action upon this bond rests upon the fact that it furnished to Rector and Daly crushed rock which was used by them in the making of such improvement. The amount of the rock furnished, its value, and the contract price therefor

are undisputed. And it is admitted by defendants that plaintiff is entitled to recover the sum of \$6189.88, unless certain payments by Rector and Daly to the plaintiff are to be applied in extinguishment of such debt.

We call the court's attention to the very important fact that the defendants do not claim in their answer that these payments were made by Rector and Daly to be applied upon such indebtedness, or that the plaintiff ever in fact applied them upon such indebtedness. On the contrary defendants' answer negatives the fact of payment and places the defense squarely on the ground that plaintiff in fraud of the rights of defendants as sureties applied such moneys upon other indebtedness and should be required by the court to change such application of payments and apply the moneys upon the claim for crushed rock. The answer alleges that such money was applied by the plaintiff to the general indebtedness of the said Rector and Daly to the plaintiff and not on account of the material furnished for the improvement of East B Street. Transcript, pp. 19, 20.

Furthermore, the findings of fact and conclusions of law prepared by defendants' attorneys places the decision of the court squarely upon the

ground, not that the payments had in fact been applied upon the account for crushed rock, but that they should be so applied. The first conclusions of law is as follows:

“That the money received by plaintiff from the City of Vancouver on account of the improvement of said East B Street and paid to the plaintiff through the Vancouver Trust & Savings Bank, **should be applied** in payment for the material furnished by plaintiff and used in the improvement.” Transcript, p. 26.

Furthermore, the undisputed evidence shows that the payments referred to were applied by plaintiff upon an account against Rector and Daly for sand and gravel furnished by the plaintiff to Rector and Daly during the same time that the crushed rock was being furnished. The evidence shows that it was a part of the original understanding between plaintiff and Rector and Daly that the sand and gravel should be paid for in cash as it was furnished from time to time, but that with respect to the crushed rock, plaintiff should wait until Rector and Daly got their money from East B Street. Transcript, pp. 30, 35, 87, 89, 90, 37.

It is not claimed by the defendants that they had any legal or equitable title to the moneys with

which Rector and Daly made the payments in question. It is undisputed that the moneys used by them in making these payments were their own moneys. The sole ground on which the sureties claim that the payments applied upon the sand and gravel account should be applied upon the account for crushed rock is that they had an **equity** as sureties in having the moneys so applied; and they base their contention that they have such an equity upon the claim that the moneys used in making such payments were moneys received by Rector and Daly on account of their contract for the improvement of East B Street. After the case had been tried and before its final decision, plaintiff requested the court to make certain findings of fact and conclusions of law. The court made the first requested finding but refused to make any of the other requested findings, and to each of its refusals an exception was duly allowed. The plaintiff's proposed findings, numbers IV to XXXIII, both inclusive, relate to the payments in question, such payments having been made by checks of Rector and Daly in favor of the plaintiff upon the Vancouver Trust & Savings Bank. There are six of these payments represented by six checks. With respect to each of these payments plaintiff re-

requested the court to find that they were applied upon the account for sand and gravel, and that they were paid out of the general checking account of Rector and Daly in such bank, and in substance that the moneys out of which these checks were paid were not moneys received by Rector and Daly under their contract relating to the improvement of East B Street, and that plaintiff had no knowledge that such payments came from such source. Transcript, pp. 185 to 194.

The proposed findings, XXXIV to XXXIX, both inclusive, requested the court to find that there was no competent evidence that the payments were made out of the moneys received on account of the contract for the improvement of East B Street. The court was also asked to make certain conclusions of law which speak for themselves. Transcript, pp. 194 to 198.

SPECIFICATION OF ERRORS.

I.

The court erred in denying plaintiff's motion to strike out as follows:

"I move to strike out all of that testimony in regard to the application—the testimony given with regard to the security for these notes and the ap-

plication of the moneys, derived from different sources for the payment of these notes, because the testimony is hearsay, and he is not able to testify of his own knowledge of any particular item, except what he was told."

II.

The court erred in refusing to make plaintiff's second proposed finding of fact.

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The court erred in overruling plaintiff's objection to defendants' proposed finding of fact and in making said finding of fact.

XLVII.

The court erred in making its first conclusion of law.

XLVIII.

The court erred in making its second conclusion of law.

XLIX.

The court erred in making its third conclusion of law.

L.

The court erred in rendering judgment in favor of the defendants, dismissing this action with costs.

POINTS AND ARGUMENT.**I.**

The court should have made the IV, IX, XIV, XIX, XXIV and XXIX proposed findings. Each of these findings relates to one of the six checks and requests the court to find that the payments represented thereby were not applied upon the crushed rock account, but on the account for sand and gravel.

As already stated in our statement of the case, the defendants' answer negatives the idea of payment and proceeds on the theory that although the payments were in fact applied upon the sand and gravel account, they should in equity be applied upon the account for crushed rock; and, as already stated, defendants' own findings of fact and conclusions of law proceed upon this theory. No amendment of the answer was made or even applied for, and the case was at no time tried upon the theory that these payments had in fact been made upon the crushed rock account. It was, therefore, the plain duty of the court to make the findings requested. In its opinion the court declined to pass on this question. See 215 Fed. 628. Moreover, the evidence is undisputed that the payments were all applied upon the sand and gravel

account with the consent of Rector and Daly. Transcript, pp. 37, 47-48, 59-60, 61, 62, 68, 73, 77.

II.

We therefore come to the broad question whether, despite such application, the court should apply these payments upon the crushed rock account. The general rules of law relating to the application of payments are well settled. The debtor may in the first instance direct such application, but in case he does not do so, the application thereof may be made by the creditor. If the creditor refuses to receive the money except upon a certain account and the debtor consents, then he has in law made the application upon such account. The general rule is that third persons have no right to control the application of payments.

30 Cyc. 1250 and cases cited.

Union Trust Co. vs. Casserly, 86 N. W. 545-546.

III.

We now come to the facts upon which defendants rest their claim, that these payments should be applied upon the crushed rock account. The evidence tends to show that Rector and Daly gave the

bank a written assignment of the moneys coming to them from the City of Vancouver under their contract for the improvement of East B Street. Transcript, pp. 167 to 169.

The most that can be claimed with regard to the moneys out of which these checks were paid is that they were moneys placed to the credit of Rector and Daly by the bank by discounting their notes. An attempt was further made to show that in each particular instance the particular note was discounted against the moneys coming to Rector and Daly under their contract. But we shall later in the brief claim that no competent evidence to this effect can be found in the record; and that our motion to strike out the evidence on this point, after it had been developed that such evidence was hearsay, should have been granted. But for the present let us take the view of the facts most favorable to defendants. These show that they had no title whatever to the moneys with which the payments were made. They were the moneys of Rector and Daly loaned to them by the bank. They were not at the time these payments were made moneys which had already been received from the city by Rector and Daly under their contract. The most that can be said is that at the time the bank

loaned them these moneys, the receipt of the money by Rector and Daly from the city was in an advanced state of contemplation.

IV.

Our first contention is that a surety has no right to disturb a lawful application of payment made by the parties, no matter what his equities may be. The authorities seem to divide on this question, but we claim an analysis of the case will show that there is very little authority against us. As supporting the broad proposition of law, we contend for, see

Puget Sound State Bank v. Gallucci, 144 Pac. 698-
People vs. Powers, 66 N. W., 215-216.

See also

Sampson Co. vs. Commonwealth, 94 N. E. 473.

Crane Co. vs. United States F. & G. Co., 132
Pac. 872.

Cain vs. Vogh, 116 N. W. 786.

Turner vs. Yates, 16 Howard 14.

In Mack vs. Alder, 21 Fed. 570, the court said at pages 572-573:

“Here the debtor and creditor are insisting on the appropriation agreed upon between them

from the beginning. No other appropriation was ever made. No representations were made to plaintiffs by the debtor or creditor that any other appropriation had been or would be made. There is no suggestion of actual fraud in the case. It is well settled that the exercise of the right of appropriation belongs exclusively to the debtor and creditor. No third party can be heard for the purpose of compelling a different appropriation from that agreed upon by them. 2 Whart. Cont. p. 926. A surety cannot compel such an application of payments by the creditor as would most relieve him. *Id.* Judge Story says the 'right of appropriation is one strictly existing between the original parties, and no third party has any authority to insist upon an appropriation of such money in his own favor, where neither the debtor nor the creditor have made or required any such appropriation.' "

In support of this rule of law we invoke the familiar principle that an equity can never be invoked as against a legal right. The application of payments is the exercise of a legal right and gives the creditor a legal right to insist that the application shall stand. In fact, the Supreme Court of

Massachusetts in *Lime Rock Bank vs. Plimpton*, 17 Pickering, 159-161, held in a very similar case that the mere right to make the application by exercising a right of setoff was a legal right under circumstances very similar, in point of principle, to those in the case at bar.

It would be a very unwise rule to make the mere fact that the creditor knows that the moneys have been derived from a particular source create a legal duty on his part to apply them in such a way as to exonerate the surety from liability. In the complexities of business affairs men do not and cannot segregate the different items of their business transactions and see that moneys received on account of a certain contract are used in extinguishing their obligations incurred by them to third persons in connection with such contract. The retailer buys a carload of flour from the wholesaler. A third person guarantees the debt. The retailer sells the carload of flour and with the proceeds pays the wholesaler, who applies it on another account. Why should the wholesaler be under any obligation to apply such money upon the flour account merely because he knows that the money was derived from the sale of the carload of flour by the retailer. He has a right to assume that the retailer is solvent

and will pay his debts. He has placed himself under no contract obligation with the surety. On the contrary, the very purpose of the suretyship is to protect him, the creditor. This is particularly true with regard to bonds like the one involved in the case at bar given to secure material men under public improvement contracts. In the great majority of cases such bonds are signed by surety companies who receive a money consideration for the risk they take. It would be contrary to public policy to require the material man to protect the rights of the surety. The duty of protecting the surety's rights rests upon the surety himself. There are many ways in which he may do this. Shall he be permitted to receive compensation for the risk and yet throw a portion of the burden upon the very party his bond was given to secure?

V.

Thus far we have been proceeding upon the theory that the plaintiff knew that the moneys out of which the six checks were paid were moneys received by Rector and Daly on account of the improvement of East B Street. But the **question of knowledge is wholly out of the case.** No where in their answer do the defendants claim that at the

time the various payments were made the plaintiff knew that the moneys were derived from the improvement of East B Street. The answer alleges the making of an agreement between plaintiff and Rector and Daly that the moneys received from East B Street should be applied upon another account, and that such an agreement was a fraud upon the rights of the sureties. But it is obvious that the mere agreement would of itself amount to nothing. The question in the background would be whether the payments so applied upon the other account were to the knowledge of the plaintiff made with moneys received from East B Street. On this point the answer is entirely silent. No knowledge is alleged and no amendment of the answer in this respect was ever made or asked for.

VI.

The plaintiff by his request that the court make the III and IV conclusions of law again raised the point that knowledge was essential and that no knowledge could be found by the court upon the ground that the answer does not allege that plaintiff had such knowledge. If knowledge is essential, it is clear upon principle and authority that the burden of alleging and proving it was upon the defendants.

Merchants Ins. Co. vs. Herber, 71 N. W. 624.

Grafton vs. Reed, 12 S. E. 767.

No evidence of knowledge was introduced in the case and all the evidence negatives knowledge. Transcript. The court in its opinion held that knowledge had not been proven. See 215 Fed. 628.

VII.

This brings us to the point that under all the authorities knowledge is essential if the surety is to be permitted to disturb a lawful application of payment. In this connection we call the court's attention to the decision in the Supreme Court of Washington, in which the question arose upon demurrer to the answer, and the answer alleged that the moneys applied upon the other account were to the knowledge of the plaintiff the very moneys received by the contractor on account of the public improvement for which the defendants had become securities. See *Crane Co. vs. Pac. H. & P. Co.*, 36 Wash. 95. In the following cases knowledge was held indispensable:

Thacker vs. Pray, 113 Mass. 291, 295.

Harding vs. Tifft, 75 N. Y. 461, 464, 465.

Grafton vs. Reed, 12 S. E. 767, 769.

Tanner vs. Lee, 49 S. E. 592.

Thacker vs. Bullock Lum. Co., 131 S. W. 271.

Inhabitants vs. Bell, 9 Metc. (Mass.) 499, 503.

The cases which appear to hold to the contrary are cases in which an agent had paid over to his principal the very moneys in his hands **belonging to the principal**. In such cases it is obvious that the ignorance of the principal at the time of applying the moneys upon an indebtedness of the agent to the principal is immaterial. The moneys are not the moneys of the agent at all, and he has no right to apply them upon his indebtedness to the principal, and the principal has no right to apply them upon such indebtedness as against the sureties on the bond of the agent, for the obvious reason that the principal in such a case would by so doing divert his own moneys from their lawful application and thus create a liability against the sureties by his unlawful act in applying his own moneys upon the debt of his agent. This is the principle which was involved in the following cases:

Merchants Ins. Co. vs. Herber, 71 N. W. 621.

United States vs. Eckford, 1 Howard (U. S.)
250.

In United States vs. Eckford, 1 Howard, 250, the

court said at pages 261, 262:

“Much less can they by the mere fact of keeping an account current, in which debits and credits are entered, as they occur, and without any express appropriation of payments, affect the rights of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the sureties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply funds in his hands, but pays them over to the government, without any special direction as to their application. Can the treasury officers say, under the circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argu-

ment. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration.

If the collector be in default for a preceding term, it is the duty of the Treasury Department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties for such term. **The money in the hands of the collector is not his money.** Without a violation of his duty, he cannot appropriate it as such. He pays it over in the performance of his duty—the duty which the sureties have undertaken that he shall faithfully perform. And shall the sureties not be exonerated? The collector has done all that they stipulated he should do. How, then can they be made responsible?”

The cases relating to the rights of sureties upon official bonds, where the officer holds the same office for several successive terms, shed light upon this question. When the officer is a mere custodian of the moneys, then the law applies the moneys received during a particular term upon his liability to account for moneys received during that

particular term. As stated by the court in *U. S. vs. Eckford's Executors*, 1 Howard 250, the very moneys turned over to the principal by the agent are in fact the moneys of the principal. But when the moneys collected by the officer are his moneys and he is merely bound to account to the public therefor, the rule is entirely different. In such cases, in the absence of knowledge the public officials may apply the moneys paid on account of a previous deficit, although they were received during a later term of office, and although the effect is to render the sureties upon the later bond liable for a deficiency created by such diversion of the moneys. This distinction is clearly pointed out by the court in *Board of Com. vs. Citizens Bank*, 69 N. W. 912. See also as sustaining the same view:

Lyndon vs. Miller, 36 Vt. 329.

Chapman vs. Commonwealth, 35 Gratt. 721.

Gwynne vs. Burnell, 7 Cl. & F. 572.

Stone vs. Seymour, 15 Wend. 19.

Egramont vs. Benjamin, 125 Mass. 15.

State vs. Hayes, 7 La. Ann. 121.

State vs. Powers, 40 La. Ann. 234.

Cobrain vs. Bell, 9 Metc. 499.

Montpieler vs. Clark, 32 At. 252.

State vs. Smith, 26 Mo. 226.

State vs. Smith, 32 Mo. 524.

Cook vs. State, 13 Ind. 154.

Crane vs. Commonwealth, 84 Va. 282.

Town of Hudson vs. Miles, 71 N. E. 63.

Inhabitants Etc., vs. Miles, 102 Am. St. 370.

These cases are directly in point. The surety on the later official bond has as strong an equity as the defendants in the case at bar to have the moneys received by the officer for the term during which he has become surety applied on account of the officer's liability for moneys collected during that term. And yet the authorities hold that in the absence of knowledge he cannot assert such an equity.

Indeed some of the decisions go further and hold that knowledge is immaterial because the moneys with which the payment is made are the moneys of the officer and he may apply them as he sees fit.

See Boring vs. Williams, 17 Ala., 510, 522 for statement of general rule that third persons cannot control the application of payment. The decision in favor of the sureties in this case, was placed on the ground of knowledge. See page 526.

The decisions in *United States vs. January*, 7th Cranch, 592, and *First Nat. Bank vs. Nat. Surety Co.*, 130 Fed., 401, merely hold that the equities of the sureties on the bond for the second term of office will be respected **where the parties have made no application of the payments made.** These cases merely modify the rule of law that the law will apply the payment upon the oldest item of the count by declaring that this will not be done in disregard of the equities of the sureties. But the court did not in these cases hold that the mere equity of the surety would be sufficient to disturb an application of payment lawfully made by the parties.

In *First Nat. Bank vs. Nat. Surety Co.*, the court say at page 409:

“But in the case at bar neither the debtor or the creditor has made any appropriation, and the deposits made were of the money of the debtor, and unaffected by an equitable charge in favor of either set of sureties, or the bank as the debtor. It was therefore quite within the general rule that *Connor & Brady* should have the right to apply their deposits to any debt due by them to the bank. But they made no appropriation whatever, and the right and duty of regarding the rights of successive

sets of sureties, when the court is called upon to make an appropriation, is conceded in the cases which maintain most strongly the debtor's right to apply his payments without regard to the source of the money or the rights of sureties."

VIII.

We here invoke a familiar rule of law that is decisive of this case. It is one of the oldest principles of the law that money has no earmarks. Based upon this principle is the well settled rule that the owner of money, wrongfully taken from him and by the wrongdoer applied in payment of his own debt, cannot disturb the application of such payment where the person receiving the money had no knowledge of the owner's rights, even though the money is received in payment of an existing debt. This rule is recognized by the Federal Supreme Court and by all the cases.

Holly vs. Missionary Society, 180 U. S., 284.

Stephens vs. Board of Education, 79 N. Y., 183.

Hatch vs. National Bank, 147 N. Y., 184.

State Bank vs. United States, 114 U. S., 401.

Specialty Glass Co. vs. Daley, 52 N. E., 633.

Spaulding vs. Kendrick, 51 N. E., 453.

Goshen Nat. Bank vs. State of N. Y., 141 N. Y., 379.

Case vs. Hammond Packing Co., 79 S. W., 732.

Smith vs. Bank, 78 N. W., 238.

Gale vs. Chase Nat. Bank, 104 Fed., 214.

Merchants L. & T. Co. vs. Lamson, 90 Ill., App., 18.

Holly vs. Domestic & Foreign M. Soc., 92 Fed., 747.

Perry vs. Overman, 60 S. E., 604.

Fifth Nat. Bank vs. Hyde Park, 101 Ill., 595.

It is well settled that payment by check or draft is within the meaning of this rule, a payment of money. It is merely a modern convenience for transferring the money to another, and the transaction is precisely the same as though the check had been cashed by the drawer thereof and the actual money delivered.

Goshen Nat. Bank vs. State of N. Y., 141 N. Y., 379.

Hatch vs. Natl. Bank, 147 N. Y., 184.

Holly vs. Domestic & Foreign M. Soc., 92 Fed., 747.

Holly vs. Missionary Society, 180 U. S., 284.

Thacker vs. Pray, 113 Mass., 291-295.

If, therefore, the moneys with which these payments were made had been the moneys of these defendants and could be clearly traced into the hands of the plaintiff, the law would say that defendants could not recover such moneys, although applied upon an existing debt. And the authorities recognize the other doctrine which rests upon this same principle, to-wit: That the owner of the money cannot question the application made by the creditor in extinguishment of his claim against the wrongdoer.

Thacker vs. Pray, 113 Mass., 291, 295.

Indeed the court in Lime Rock Bank vs. Plimpton, 17 Pickering, 159, went further and held that the owner of the money could not follow it, although it had not been applied by the creditor to the debt of the wrongdoer at the time such creditor learned the true ownership of the money, but had been merely loaned to him by such wrongdoer under circumstances such that he had the right to so apply it.

Said the court in this case:

“The only question, therefore, is whether, after notice, the defendants could lawfully detain the money, and we are of opinion that they could. As Parkhurst was indebted to them in a sum exceeding the loan, they had a legal right of set-off as against Parkhurst, of which they could not be deprived by the intervention of the plaintiffs’ claim. * * *. The defendants, therefore, had a legal right to appropriate the money lent, to the payment of their own debt.”

But the case at bar is not so favorable to the defendants. They never for a moment owned a dollar of the money with which the payments were made. They did not even have an equitable title thereto. The moneys were the moneys of Rector and Daly obtained by them by putting up their own notes to the bank. The authorities cited demonstrate that they could not question the application of these payments, even if the money had been theirs and had been wrongfully taken from them by Rector and Daly, there being no knowledge alleged, proven or found in the case.

It would be a serious doctrine for the business world to hold that perhaps after the lapse of years the sureties, on discovering the fact, could insist that

an innocent application of the moneys by the creditor to another debt should be disturbed.

See

Harding vs. Tifft, 75 N. Y., 461, 465.

Tanner vs. Lee, 49 S. E., 592.

In this last case it appeared that the wife had given her husband money to apply on her note. But the payment was applied upon the husband's note, the creditor not knowing the source from which the money came. The court held that the wife could not question the application of the payment.

“Besides, the payment may have lulled the creditor into nonaction. Relying thereon, he may have lost the opportunity to collect by means which were not resorted to because he thought the debt had been fully or partially paid. These considerations, along with the credit on the existing debt, furnish a sufficient consideration to support the transfer of title, and enable the creditor without notice of her claim to retain the same against the defendant.”

IX.

Plaintiff's application of the payments made cannot be disturbed on account of suspicion. In

such cases the doctrine of constructive notice does not apply. The rule with regard to negotiable paper is not only that an existing debt is sufficient to make the purchaser of the paper a bona fide holder, but that nothing short of actual notice or fraud can affect his title. This rule of law applies with much greater force to money, and the authorities hold that the third party who has innocently received the money cannot be disturbed in his legal position by mere proof that there were facts sufficient to put a prudent man on inquiry that the money received was not the money of the person paying it. And certainly this must be the rule in those cases in which the facts would be sufficient to put a prudent man on inquiry as to whether the third person did not have a mere equity in having the money used for a certain purpose.

First Nat. Bank vs. Gilbert, 49 Southern 593.

Merchants L. & T. Co. vs. Lamson, 90 Ill.,

App., 18, and cases cited.

We cite the following authorities, which are a few of the many that sustain the doctrine that the title of a person to whom negotiable paper transferred will not be destroyed by proof that he had knowledge of facts sufficient to put a prudent man on inquiry, but that only actual knowledge or fraud

on his part will defeat his title.

Goodman vs. Simonds, 20 How., 343.

Hotchkiss vs. National Shoe & Bank, 21 Wall., 354.

Swift vs. Smith, 102 U. S., 442.

Cromwell vs. Sac. County, 96 U. S., 51.

7 Cyc. 944, and cases cited.

Under this rule the purchaser of negotiable paper from a thief secures a good title unless knowledge or fraud on the part of the purchaser is established. And this title is equally good if he takes the note in payment of an existing indebtedness.

Swift vs. Lyson, 16 Pet. 1.

X.

These rules, both of which are recognized by the United States Supreme Court, apply with still greater force to money. The question is one of general law and not of statutory construction. The Supreme Court of Washington treated it as such in Crane vs. Pacific Heat & Power Co., 36 Wash., 95.

There is nothing in the language of the statute or indeed in the bond itself in any manner creating any obligation on the part of the person furnishing

materials to the contractor to respect the so-called equity of the surety. Any obligation of this kind must be deduced from principles of equity jurisprudence.

XI.

The United States Supreme Court has repeatedly held that in cases where a question of general jurisprudence is involved, the federal courts will not be governed by the decisions of the state courts on the same point.

Swift vs. Lyson, 16 Pet., 1.

Liverpool S. Co. vs. Phoenix Ins. Co., 129 U. S., 397-443.

N. P. Ry. Co. vs. Peterson, 162 U. S., 346.

Bentler vs. Grand Trunk & C. Co., 224 U. S., 85.

XII.

However, as before stated, the decision by the Washington Supreme Court does not touch this case, because all the court decided in that case was that the payment must be applied upon the contract, when it appears that the creditor knew that he was being paid with the very money which the con-

tractor received from the city.

XIII.

The doctrine contended for in this case is an unwarranted extension of the trust fund doctrine. That doctrine permits a person to follow his property so long as he can trace it in substance, although the form may be changed. First of all we contend that this doctrine never has been and never can be applied to the case of payment of money upon a debt. As already shown by the authorities, the owner of the very money paid cannot follow it in the hands of the creditor upon whose debt it has been paid. If then the owner of the legal title to the identical money that was paid cannot follow it, much less can one follow it who is merely invoking the doctrine that, while he did not have the legal title to the money paid, it was in substance his money.

The authorities are unanimous in recognizing the rule that the trust fund doctrine can have no application when it relates to money which has been received in payment of an existing debt without actual knowledge of the equity of the third person.

Burnett vs. Gustafson, 54 Ia., 86.

Stephens vs. Bd. of Education, 79 N. Y., 183.

Charlotte Iron Wks. vs. Woolfs Cloth. Co.,
156 Ill., App., 377, 380.

Pom. Eq. Juris. (3rd Ed.) S. 1048,

where this rule is very clearly stated.

But the case is not even as favorable as this to the defendants. They never for a moment had any title, legal or equitable, to the money with which Rector and Daly paid the plaintiff. Rector and Daly were not even guilty of any fraud upon the sureties in using the money derived from East B Street, (assuming that it was so derived) for the purpose of paying other indebtedness owing the plaintiff. This is a thing that is done every day in the ordinary course of business. As a practical matter it never operates to the detriment of the surety, except in the event of the insolvency of the contractor. The so-called equity of the defendants was at most an anticipation, which they may have entertained as business men, that the proceeds of the contract would take care of the obligations for which they had become sureties. If they were afraid that these anticipations might be defeated, they could have taken security or have obtained some control over the moneys to be derived from the contract, so that they would be sure that such money was used to

extinguish the obligations for which they had become sureties.

The decision in *United States vs. American B. & T. Co.*, ~~91~~⁸⁹ Fed., 921, and in the Circuit Court of Appeals at 925, can be distinguished from the case at bar on a number of grounds. In the Circuit Court, the court placed the decision upon the ground of estoppel and upon the ground that the persons furnishing the materials had discharged the sureties by extending the time of payment beyond the time when the public improvement contract was completed and all the moneys thereunder paid. The court said:

“Looking to the opportunity for protecting himself which the surety has if the debt for materials is due when the final payment is made by the government, it seems but reasonable that, if the material man designedly extends the payment beyond that time, he should be held to have released the surety, and to have elected to look solely to the debtor.”

In the Circuit Court of Appeals, the court referred to the fact that the surety had been induced to sign the bond by representation of the plaintiffs in error that the contractors owed no debts, when as a matter of fact, the contractors at the very time

owed the plaintiffs in error a considerable sum of money, and in this connection the court used the following language:

“Defendant in error was actually led into this particular transaction by the acts of the plaintiffs in error, and surely no court will hear them contend that the surety executing the bond has not complied with its terms and conditions, when they have actually received the money payable under the contract, and applied it, not in accordance with the terms of the contract under which they sold their goods to the contractor, but applied it to another and different debt due themselves, and which would have been worthless but for the misapplication of the payments thus made to them.”

XIV.

The defendants have wholly failed to trace the money within the scope of the trust fund doctrine. Taking their own theory of the evidence it establishes simply these facts: Rector and Daly, in the course of the performance of their contract, would need credit, not only for the purposes of this contract but for their general business as contractors. To give them this credit the bank obtained from

them the assignment of the moneys and bonds to be received by them under the contract as collateral security for future advances. From time to time Rector and Daly were credited with the proceeds of notes which they gave to the bank. Whether they were all given under this arrangement will be discussed later. It was out of the proceeds of some of these notes that it is claimed the payments in question were made. But it is obvious that at the time these payments were made no money had yet been received from the city under their contract.

What had occurred was that Rector and Daly in anticipation of receiving money under the contract in the future had borrowed money of the bank, and with this money paid the plaintiff. A simple test will determine whether the money so paid was money derived from the contract. Suppose Rector and Daly had paid these notes from other funds, or suppose that the bank had released its security and taken a real estate mortgage to pay these notes and had collected them by foreclosure of such mortgage, could it claim that in such case the moneys had been derived from the contract? This test shows that the essence of the transaction was this: Rector and Daly had borrowed money on their notes upon collateral. What that collateral was is wholly im-

material. The loan was to them and did not represent a dollar of money which they had received from the city.

We cite the following cases in support of our contention that the facts do not bring the case within the trust fund doctrine at all, even assuming it could apply to a case where the creditor, without knowledge, had received money in payment of his debt.

First National Bank vs. Littlefield, 226 U. S., 110.

In re Brown 193, Fed. 24.

Empire State Surety Co. vs. Carroll County, 194 Fed., 593.

Schuyler vs. Littlefield, 34 Sup. Ct. Rep., 466.
Crawford County Coms. vs. Strawn, 157 Fed., 49.

Lowe vs. Jones, 78 N. E., 402.

Nixon State Bank vs. First Nat. Bk., 60 So., 868.

Red Bud Realty Co. vs. South, 131 S. W., 340.

Bettendorf & Co. vs Mass. & Co., 187 Fed. 590.

In re T. A. McIntyre Co., 185 Fed., 96.

Jaffe vs. Weld, 139 N. Y., Supp., 1101.

In re Lee, 209 Fed, 172.

XV.

To understand this transaction it is necessary to look at the practical business situation. Rector and Daly would need money from time to time in carrying out their contract. But they were to be paid not in money but in bonds of the city. This made it necessary for them to make some kind of financial arrangement under which they could secure temporary loans until they could realize upon the bonds. Such an arrangement was made with the bank. To secure the bank, Rector and Daly assigned to it all moneys coming to them under their contract with the city. The value of this collateral from time to time would depend upon how much had been earned under this contract. Therefore, the bank, before making loans to any extent, naturally required that estimates from the city, showing what had been earned by Rector and Daly, should be produced. This is all the witness, Evans, means when he says these loans were made against such estimates. In fact, he says so in so many words. His testimony is:

“The security of these notes I have testified about was the assignment that was put on

record in the clerk's office, and that is the only way I know." Transcript, p. 119.

Indeed it would be absurd to hold that the bank was trying to get any additional security upon the moneys to be derived from the contract, when the bank already held the absolute right to receive all such moneys under the assignment previously made to it as collateral. When these moneys were loaned to Rector and Daly by the bank they were not then moneys derived by Rector and Daly from the city. The evidence is undisputed that the only moneys which the bank ever received from East "B" Street and placed to the credit of Rector and Daly were the moneys derived from the warrant issued by the city and representing cash paid to it by the property holders along the line of improvement and the bonds aggregating \$11,500 par value, as shown by the three receipts, Defendants Exhibits Nos. 10, 11 and 12.

The witness Evans testified on this subject as follows:

"The company received no further money from East 'B' Street except **these** bonds and **that** warrant." Transcript, 109.

The warrant issued was for \$10,046.17. Turning to Plaintiff's Exhibit "C" we find under date of

September 11th that this warrant was cashed and the proceeds placed to the credit of Rector and Daly, along with another item for \$1000. The debit entry on the same date shows that all of this cash and more than \$7000 more was checked out by Rector and Daly by checks aggregating \$18,626.04. Transcript, pp. 157 and 158. It is therefore, clear that none of this cash was ever used by the bank to pay any of these notes given by Rector and Daly to the bank. Nor is there any evidence that any part of the proceeds of the bonds for \$11,500 were ever applied upon these notes. Rector and Daly did not sell the bonds to the bank; but the bank sold them to Carnstens & Earle, of Seattle for 87 cents instead of par; and the proceeds were placed to the credit of Rector and Daly by the bank and used for taking up their notes. Transcript, pp. 108-109. But it appears in the case that Rector and Daly, during this time, discounted at the bank not merely these six notes, aggregating less than \$10,000, but sixteen notes aggregating over \$25,000. Transcript, p. 118.

There is no evidence to show when these bonds were sold or when the proceeds were received or on which of these sixteen notes they were applied. So far as the evidence goes there is nothing to show that a dollar of the money that was received from

these bonds was ever applied on any of the six notes in question. The only possible way in which the money could be traced as money coming from the city would be on the ground that the money derived from these bonds had in fact been applied in extinguishment of the notes, the discount of which made the credits against which Rector and Daly checked in making these six payments. And in this connection we cite the familiar rule relating to the trust fund doctrine, that the moneys must be clearly traced. See authorities already cited.

The following facts show that none of the seven checks offered in evidence should be applied on plaintiff's claim, for the balance due for crushed rock.

The check for \$649.25 (Ex. 3) has been credited by plaintiff on the claim in the complaint. It, with a discount of 2 per cent, was received by plaintiff in payment of the rock delivered on June 25, 1911. Transcript, pp. 5, 30, 57, 64, 166, 184, and it is for only the balance, after applying this payment, that this action is brought.

The check for \$501.64, (Ex. 7) was applied on the account for purchases made prior to July 1st, 1911, and all of plaintiff's claim for rock is for rock sold after July 1st. This check is dated June 23, 1911,

and was credited to the amount against Rector and Daly on that day. Transcript, pp. 47, 48, 63, 115, 116, 167, 181. This paid for rock used on Fourth Plain Street, pp. 47-48. Moreover the attempt to trace the money coming from B Street into this check utterly fails for the reason that the note for \$5770, given at the time this check was given was not the only item of deposit that day. It appears there was another item of \$1115.75, and that it is impossible to tell from which of these two items this check was paid. Transcript, pp. 115-116.

The check for \$1017.49, (Ex. 5) was also applied on the old account before July 1st, 1911. It was given the later part of June, 1911, and was post-dated, as was sometimes done. Transcript, pp. 63, 65, 47, 181, 166. Moreover this check was not paid out of the proceeds of the note on \$2300, but was paid by the bank out of its own money. The payment of this check created an overdraft, and thereafter Rector and Daly covered this overdraft by giving the note for \$2300. Transcript, pp. 110 to 112.

The check for \$859.90, (Ex. 4) was paid out of the bank's money. The note for \$2079.40 that was given in connection with it did not pay the overdraft existing at that time. He was then overdrawn \$2565.43 and after this note was given he was still

overdrawn. Transcript, p. 115.

Moreover the items that were taken into account by the bank in discounting this note for \$2079.40 related to estimates on Fourth, Plain and Connecticut Streets as well as on B Street. The estimate on B Street was only for \$574.20. Transcript, p. 115. Besides this check was given to pay up the old account to July 1st, 1911. Transcript, pp. 57, 58, 67, 68.

The check for \$3,000, (Ex. 6) even if paid out of the proceeds of the note for \$4000, does not represent a payment of B Street funds. The note shows on its face that as late as July 30, 1912, there was still \$2129.60 due on it. Transcript, p. 172. It is significant that the court records do not show that this note was given on account of B Street. Transcript, p. 114.

The check for \$1216.25 (Ex. 1) was given in connection with a note for \$1306, and this note was secured by a draft drawn at the same time, but which was never paid. Transcript, pp. 113-114. Even after this note was given the account of Rector and Daly did not have a sufficient balance to take care of this check. Transcript, pp. 113-114. It is undisputed that this check was applied on the sand and gravel account. Transcript, pp. 37, 38, 59, 60.

The check for \$1000 was not applied on the crushed rock. Transcript, pp. 69 to 71, 98 to 100, 74 to 76, 127, 128, 133.

And in connection with this check we must keep in mind the fact that defendants do not allege payment, but an equity that certain payments which were applied upon another account should be applied upon the crushed rock.

XVI.

There is still another reason why the contention of the defendants cannot be sustained. They claim that they have an equity in having the moneys paid to the contractors by the city applied upon the debt for materials furnished the contractors in the carrying out of the contract. This assumes that **money** was to be paid to the contractors; but as a matter of fact, the contractors were not entitled to a dollar of money from the city on their contract. They agreed to accept bonds in pay. The language of the contract is; "And said parties of the first part herein agree to receive and accept said local improvement bonds for all sums of money which they are to receive from said party of the second part under this contract." Transcript, pp. 12-13.

Plaintiff was not bound to take any of these bonds in payment of his claim. It sold the crushed

rock for money and it had the right to demand money in payment therefore. Plaintiff was not bound to ascertain whether its payments came from the proceeds of such bonds, and as a matter of fact they did not. It would be under no obligation to assume that any of these payments were out of money realized from the sale of these bonds; or make any investigation to determine which of the two accounts it should apply the moneys on.

XVII.

The opinion of the court shows that the court found that plaintiff had no knowledge of the source from which the moneys came, and decided the case on the ground that knowledge was wholly immaterial. The court did not even regard as material the question whether plaintiff had constructive notice. It is true that the court refers to this point in the opinion, but no finding on the subject was made. We call attention to the following portions of the opinion to substantiate our claim in this respect:

“The controlling questions of law to be applied to these facts are: If the money paid the plaintiff was realized from the work secured under the contract, will it be applied in pay-

ment for the crushed rock furnished Rector and Daly by plaintiff; and whether it is necessary to show that the plaintiff knew it was realized from such source before such application will be made." 215 Fed. 625-626.

"While not entirely satisfied upon the question of whether there was an actual appropriation by plaintiff of the checks in payment of what plaintiff refers to as 'sand and gravel account,' in view of the conclusion reached, a finding upon the question is deemed not necessary."

"Knowing these things would, doubtless, constitute reasonable grounds for belief upon his part that such payments were from that source, and was enough to put him upon inquiry as to the source from which they were derived; but they are not enough to warrant a finding of actual knowledge on the part of Captain Hackett, in the face of the positive testimony of himself and Rector." 215 Fed., 628.

"The plaintiff in this case does not occupy the position of an innocent purchaser. The want of knowledge may strengthen an existing equity, but it does not create an equity." See 215 Fed., 630.

These extracts from the opinion make it obvious

that the court did not pass upon the question whether the parties had made an application of the moneys to the sand and gravel account. In view of the allegations in the answer to the proceedings on trial, it is clear that the very basis of the defendants' defense was that the parties had applied the payments upon the wrong account.

XVIII.

The findings of the court do not justify the judgment. There is no finding that the plaintiff had knowledge that the moneys paid to it and applied on the sand and gravel account were in any manner derived from the contract relating to the improvement of East B Street.

It is well settled that where the court in an action at law in the Federal Court assumes to make findings, the findings of fact must sustain the conclusions of law and the judgment.

Sections 649 and 700, R. S., U. S.

Saltonstall vs. Butwell, 150 U. S., 417.

Stone vs. United States, 164 U. S., 380.

Lehner vs. Dickson, 148 U. S., 71.

British Queen Mining Co. vs. Baker Silver Mining Co., 139 U. S., 223.

Webb vs. National Bank, 146 U. S., 717.

Hooven & Co. vs. John Featherstone, 111 Fed.
81.

Guaranty Trust Co. vs. Koehler, 195 Fed. 669.

Chicago & R. Co. vs. Barrett, 190 Fed., 18.

Hayden vs. Ogden Savings Bank, 158 Fed. 90.

Upon the face of the findings the conclusions of law that defendants are entitled to judgment are unwarranted. Such conclusions of law must be deduced exclusively from the findings made and not from the evidence, and therefore the court cannot assume any general finding in support of the judgment. The language of the findings in this respect is: "From the foregoing findings of fact the court concludes:" Then follows the three conclusions of law in favor of the defendants.

XIX.

Even if the doctrine of constructive notice applied to this case, yet the judgment cannot be sustained, as the court nowhere finds that plaintiff at the time of receiving the payments had constructive notice or had knowledge of facts sufficient to put it upon inquiry.

XX.

Moreover, there is no sufficient evidence in the case to warrant a finding of constructive notice.

XXI.

The only evidence tending to show that the moneys with which these payments were made had any connection with the East B Street improvement was the testimony of Milton Evans, the assistant cashier of the bank. His cross examination developed the fact that with respect to some of the facts tending to show that the moneys out of which the checks were paid were advanced on account of the East B Street contract, were facts not known to him personally, and thereupon a motion was promptly made to strike out all of his evidence in this respect. Transcript, pp. 116, 117, 118, 120.

The denial of this motion is assigned as error. Transcript, p. 199.

It should have been granted for the reason that some of the evidence was admitted by Evans to be hearsay, and he not being in position to separate from such hearsay the facts which he knew of his own knowledge, no one knows which of those facts were within his personal knowledge. This point was also raised before the final decision of the court by the XXXIV, XXXV, XXXVI,

XXXVII, XXXVIII, XXXIX findings proposed by plaintiff. Each one of these proposed findings refers to one of the six checks, and in substance requests the court to find that there is no competent evidence to show that that check was paid out of money received by Rector and Daly from or on account of said street improvement B, or in any manner derived therefrom or having any connection therewith. These requests were refused, and to each refusal an exception was allowed. Transcript, pp. 194, 195, 184, 185. See also assignments of error, 39 to 44, both inclusive. Transcript, p. 203.

XXII.

The objection to the jurisdiction of the court on the ground that there was not the necessary diversity of citizenship to give the Federal Court jurisdiction is so ably discussed in the opinion of the court itself that all that will be required is a mere statement of the facts and the law. There was the necessary diversity of citizenship unless one of the defendants was a citizen of the State of Oregon at the time the action was commenced. It is claimed that it does not appear that Rector and Daly were citizens of a state other than Oregon. But this would not be fatal to the jurisdiction of the court.

They were not indispensable defendants. The bond sued upon was the joint and several bond of Rector and Daly and their sureties. Transcript, p. 13.

Under the statute of the State of Washington, the plaintiff could proceed against the sureties alone.

1 Rem. & Bal. Ann. Codes (Wash.), Sec. 192.

See also Pac. Bridge Co. vs. Fid. Co., 33 Wash., 47.

9 Cyc. 709.

Under the conformity statute of the United States it has been held that a state statute determining who are and who are not indispensable parties is controlling in the Federal Courts.

Sawin vs. Kinney, 93 U. S., 290.

See also Atlantic & P. L. vs. Land, 164 U. S., 400.

The rule in the Federal Courts is that the naming of a defendant who is not an indispensable party will not defeat the jurisdiction of the court. In such cases the court may, for the purpose of retaining jurisdiction, dismiss the action as against such party. Rector and Daly were never served with process and never appeared in the action, and when

the question of jurisdiction was raised, the plaintiff, to save any doubt on the point, made a motion to dismiss the action as to Rector and Daly, and this motion was granted. Transcript, pp. 22-23.

On the proposition that the court will allow the plaintiff to dismiss with respect to persons who are not indispensable defendants, in order to obviate the objection to the court's jurisdiction, see:

Beebe vs. Louisville & Co., 39 Fed, 481-484.

Morse vs. South, 80 Fed., 206-207.

Hicklin vs. Masco, 56 Fed., 549.

Claiborne vs. Weddell, 50 Fed., 368.

Smith vs. Consumers C. O. Co., 86 Fed., 359.

Oxley Stave Co. vs. Cooper & Union, 72 Fed., 695.

Sioux City T. R. & W. Co. vs. Trust Co., 82 Fed., 124.

Grove vs. Grove, 93 Fed., 865.

Mason vs. Dullagham, 82 Fed., 689.

Bane vs. Keefer, 66 Fed., 610.

Tug River C. & S. Co. vs. Brigel, 86 Fed., 818.

Horn vs. Lockhart, 17 Wall. 570.

See for a case peculiarly in point:

Smith vs. Consumers C. O. Co., 86 Fed. 359.

But the record does sufficiently show that Rector and Daly were citizens of the State of Washington at the time commencement of the action. It is well settled that the decisive test is at the time the action is commenced.

Koenigsberger vs. Richmond S. M. Co., 158 U. S., 41.

Metcalf vs. Watertown, 128 U. S., 586.

When the point is not made until after the case is tried, the court will explore the whole record to find if it discloses evidence of the requisite diversity of citizenship.

Juneau vs. Brooks, 109 Fed., 353.

Railway Co. vs. Ramsey, 22 Wall., 322.

Steamship Co. vs. Tugman, 106 U. S., 122.

Robertson vs. Cease, 97 U. S., 646.

The contract between Rector and Daly and the City of Vancouver attached to the complaint and admitted by the answer, contains the following recital: "Rector and Daly, both of the City of Vancouver, County of Clarke, State of Washington." The bond sued upon contains the following recital:

“Rector and Daly, of Vancouver, Washington.” These recitals are admitted to be true and certainly warrant a conclusion of citizenship at the time the contract and bond were executed. Transcript, pp. 8-13.

It is a familiar rule of evidence that a fact once shown to exist is presumed to continue to exist until the contrary is proven, and this rule has been applied in the case of citizenship. The law presumes that the citizenship of Rector and Daly in the State of Washington continued until the time of the commencement of the action.

Inhab. of Chicago vs. Inhab. of Whatley, 6 Allen, 508.

Daniels vs. Hamilton, 52 Ala., 105.

Prather vs. Palmer, 4 Ark., 456.

Rixford vs. Miller, 49 Vt., 319.

State vs. Jackson, 65 Vt., 657.

9 Cyc. Evidence, 914.

XXIII.

The questions argued are properly before the court. A trial by jury was waived by written stipulation, signed by the parties and filed by the clerk

before the trial. This brings the case within Sec. 649 and 700, R. S. U. S. Under these sections the court may review any error committed upon the trial. This includes findings of fact, which are wholly unsustained by the evidence; refusal to find necessary facts which are supported by the undisputed evidence; refusals to make the rulings upon legal points requested by the plaintiff and all errors in the rejection or admission of evidence. It also raises the question whether the special findings are sufficient to support the judgment. Whether they are sufficient, depends upon the findings themselves, and they cannot be helped out by any reference to the opinion of the court.

Stone vs. U. S., 164 U. S., 380.

Saltonstall vs. Butwell, 150 U. S., 417.

Dickinson vs. Bank, 16 Wallace, 250.

York vs. Washburn, 129 Fed., 564, 566.

Hayden vs. Ogden Sav. Bank, 158 Fed., 90.

XXIV.

But the opinion may be examined for the purpose of determining upon what legal theory the court decided the case.

United States vs. Norfolk & W. R. Co., 114
Fed., 682-686.

Loeb vs. Trustees, Etc., 179 U. S., 472-482-
483.

XXV.

Counsel for defendant contended in the court below that the books of plaintiff would show an application of the payments to the sand and gravel account, or at least an application of the moneys to a current account embracing items of sand and gravel and crushed rock. Even if this were so the fact would be wholly immaterial, in view of the undisputed evidence in the case. All the testimony shows that all payments were to be applied upon the sand and gravel until it was fully paid for, and that it was upon such agreement that the material was furnished by plaintiff to Rector and Daly. Transcript, pp. 30, 35, 37, 87, 89, 90-134-135.

In addition to this, defendants' own answer alleges this to be the fact, claiming that such an understanding was a fraud upon the sureties. In their brief in the court below they again made the same contention, saying:

“That there was an understanding between the plaintiff and Rector and Daly that the money which

was received by Rector and paid to the plaintiff, whether it came from this improvement or any other source, should be applied by the plaintiff on the unsecured claim."

These undisputed facts bring the case within an elementary rule of law supported by all the authorities. That rule is this: Where there is an understanding between debtor and creditor that payments are to be applied upon certain items of a current account, the agreement is controlling, and the moneys will be applied in extinguishment of such items, although the books of account kept by the creditor merely show a running account, embracing all items on the one side of the account and crediting all payments on the other side thereof, without any indication of the application of the payments upon the books themselves.

Mack vs. Alder, 22 Fed., 570.

Price vs. Dowdy, 34 Ark., 258, 289.

Smith vs. Vaughan, 78 Ala., 201.

Langdon vs. Bowen, 46 Vt., 512, 515.

Miller vs. Womble, 29 S. E., 102.

30 Cyc., 1245.

XXVI.

This court has power to render final judgment in favor of the plaintiff, and we contend that this is a case where such power should be exercised.

Allen vs. St. Louis Nat. Bank, 120 U. S., 20.

Evans vs. Kister, 92 Fed., 833.

Reed vs. Staff, 52 Fed., 641.

XXVII.

The record properly shows the fact that a jury trial was waived by a written stipulation filed before the trial. Transcript, pp. 21, 22, 27.

Kearney vs. Case, 12 Wall., 275.

Dickinson vs. Planters Bank, 16 Wall., 250.

Bond vs. Dustin, 112 U. S., 604.

The judgment should be reversed and the District Court should be directed to render judgment in favor of plaintiff and against defendants for the amount due, \$6189.88, with interest thereon from October 17, 1911, and also all the costs in both courts.

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Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

COLUMBIA DIGGER COMPANY,
a Corporation,

Plaintiff in Error,

vs.

M. R. SPARKS and C. A. BLUROCK,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

MILLER & WILKINSON

VANCOUVER, WASHINGTON

ATTORNEYS FOR DEFENDANTS IN ERROR

Filed

NOV 26 1915

F. D. [unclear]

Clerk

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Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

STATEMENT.

This action was commenced by the plaintiff to recover the sum of \$6189.88 for crushed rock which plaintiff alleges was furnished to contractors engaged in a public improvement of the City of Vancouver, Washington. The defendants were sureties under a bond given in pursuance of the provisions of Chapter 6, Title VIII, Remington & Ballinger's Annotated Code and Statutes of the State of Washington.

The improvement is known in the record as B Street in the City of Vancouver, Washington, and the material which plaintiff seeks to recover for was crushed rock which went into the improvement of the street. Before the contract was completed the contractors abandoned their contract and were declared bankrupts and the sureties completed the improvement and have settled the claims and demands that were legally chargeable against the improvement and for which they were liable under their bond.

It is contended by plaintiff that the sureties are liable for plaintiff's claim. This claim of plaintiff is based upon the right of the plaintiff to recover under the statutory bond mentioned above and does not grow out of any direct contractual relations between the plaintiff and these defendants.

It was alleged in the answer filed by these defendants that an agreement was entered into between the plaintiff and the principal contractors that the money received from time to time upon the estimates of the City Engineer was to be applied on the general indebtedness of Rector & Daly which was unsecured and that the plaintiff would look to the sureties for the material furnished for the improvement of B street, and that such agreement was without the knowledge and consent of the sureties and that payments were made by the City based upon the engineer's estimates to the contractors from time to

time, and that the contractors paid the money so received by them from the City to the plaintiff, and that the sum so received was in excess of the material furnished by the plaintiff and which was used in the improvement of the street.

These allegations were denied by the plaintiff in a reply filed by it and the principal issues raised by the pleadings were, first, the nature of the understanding and agreement had between Rector and Daly and the plaintiff as to the manner of payment for the material which went on this street; second, whether the City had made payments to the contractors and whether the contractors had, in turn, made payments from the money which was received from this improvement to the plaintiff; third, the manner in which payments received by plaintiff were applied by it and whether it had received sufficient sums which were derived from this improvement to liquidate and pay for the materials which went into this improvement.

ARGUMENT.

On pages 29 and 30 of the transcript of record M. A. Hackett, called as a witness for the plaintiff, testifies that before any crushed rock was furnished for this improvement that he came to Vancouver to find out when he could make deliveries of the rock and when he would

get his money for the crushed rock, and he states that Mr. Rector told him that he “could not pay in cash for the crushed rock, but as soon as he got his money off of B street, why, he would pay for the crushed rock, and that he would have to ask us to wait for the money until he did get his money from B street, and we asked him what surety he would have if we waited for our money, and he said that he had a bond to the City to pay for all labor and material, a good bond, he mentioned who was on the bond, Mr. Blurock and a man named Sparks, I think, and so under those conditions we thought we were perfectly safe in furnishing him the rock and waiting until he got his money off of B street, so we began to make deliveries as soon as we could.”

Again, on page 33, the same witness on cross-examination says, “I guess that is right, but we were not to get any pay for rock on East B street until he got his money.”

Again on page 41, the same witness on cross-examination says, “No sir, I would have delivered the rock whether he would have given me the check, or not; I was willing to furnish it until he got his money to pay me.”

On page 48 the same witness, “Because we agreed to wait for him upon the rock, until he got his money.”

On page 86 A. B. Rector, a witness for plaintiff, on

cross-examination admitted that at a former trial he testified as follows:

“Q. Did you have an arrangement with the Columbia Digger Company that you could do that and let the crushed rock account stand because you had a bond to protect you?

A. I think we probably did.”

And again on page 87 the same witness:

“Q. When did you make this arrangement with the Columbia Digger Company, that the cash should go on the sand and gravel and the bondsmen stand for the crushed rock?

A. May or June, 1911.

Q. At that time did you tell Sparks and Blurock?

A. I did not.”

Again on page 88 this same witness:

“Q. What arrangement did you have with the Columbia Digger Company with reference to credits of all money you sent them, where and how it should be credited?

A. All the money I should pay for sand and gravel so I would get my discount, that was the arrangement.

Q. That was all the arrangement?

A. All money paid should be applied on sand and

gravel so as to keep up our discount, any money to be paid there should be applied on sand and gravel.

Q. Any money should be applied on sand and gravel so as to preserve your discount?

A. So as to preserve.

Q. And your crushed rock should run?

A. Could run.

Q. And that was done?

A. Yes.

Q. And that arrangement was not called to the attention of the bondsmen?

A. I do not think so, in fact I know it was not."

This testimony quoted was brought out on cross-examination of this witness as having been testified to at a former trial, and he admitted that he so testified.

The record discloses that the contract which Rector & Daly had with the City provided that montly payments should be made as the improvement progressed and that payments should be made upon these monthly estimates, the City retaining 20% of the amount earned and paying the contractors 80% of the monthly estimates. This contract was of record in the City Clerk's office during all of the time that plaintiff was engaged in furnishing the material in question, and the record further discloses that this provision of the contract was carried out by estimates being furnished by the City Engineer

monthly, based upon the amount of work and material which had gone into the improvement during the previous month and that upon these estimates being filed with the proper officers of the City either money or bonds were issued up to 80% of the completed improvement; and the record further discloses without contradiction that under an arrangement made between the contractors and the Vancouver Trust & Savings Bank the money which was paid upon the monthly estimates was paid to the Vancouver Trust & Savings Bank. The record will further disclose that before the work commenced Rector & Daly made an assignment to the Vancouver Trust & Savings Bank of all of the money which should come to them for this improvement, and that the bank in consideration thereof agreed to advance money to Rector & Daly based upon the monthly estimate for the purpose of paying for labor and material which went into the improvement, and that during the time the plaintiff was furnishing the material involved in this action the Vancouver Trust & Savings Bank received from the City on account of the improvement in question over \$22,000.00. The record further discloses, and on this point there is no contradiction, that during this time the plaintiff received from the Vancouver Trust & Savings Bank checks which were turned into cash amounting to \$7312.15.

It is our contention that the evidence stands uncontradicted that the money which plaintiff received from

the bank was money which was advanced by the bank to the plaintiff against the estimates as the work progressed on the improvement of the street, and is directly traceable to that fund.

The first payment for the crushed rock was the sum of \$662.50. This the defendants are given credit for by the plaintiff. The next payment was a check for the sum of \$1216.25 and was paid by check dated August 8 1911, and is defendant's "Exhibit No. 1"; this check had endorsed on it "7/5-483 y C Rock 603.75

7/6-490 y C Rock 612.50

1216.25"

It is admitted by plaintiff on page 39 of the transcript of record that this crushed rock went into this improvement and is a portion of the material that plaintiff is suing for in this action; Hackett, however, contends that after this check was received by the plaintiff at its office in Portland he discovered this crushed rock endorsement and that he called Rector on the phone and in a conversation with him it was then agreed that it might be applied on the sand and gravel account.

The district court in passing on this particular payment held that the application made by Rector & Daly at the time the check was issued constituted such an application as could not thereafter be changed to the prejudice of the sureties, using this language:

“It operated *instantly* to discharge the liability of the sureties *pro tanto*, and while plaintiff and Rector and Daly might thereafter, as between themselves, change the application of such payment, it would not operate to revive the extinguished obligation by defendants.” (Citing authorities.)

This is undoubtedly the rule, and counsel in their brief do not seem to question the soundness of the doctrine announced by the court relative to this particular check. So that on the question of application of payments this check must be considered as a payment for crushed rock because of the direction which was made upon the check at the time it was issued and delivered to the plaintiff, but if the court is wrong in its application of this principle of law to this check we still have the testimony that at the time the check was given it was issued directly against the B street assignment.

Mr. Evans testifies on pages 113, 120 and 121 of the transcript of record, that at the time this check was presented it was not paid because of want of funds and went to protest and that at that time Rector & Daly had overdrawn their account in the sum of \$661.93, and that a note was taken by the bank to cover the amount of the check, and that that note was based against the assignment on East B street; it further appeared that some collateral security was given at this time, but that the

collateral was of no value and nothing was collected from it. Rector & Daly's account at the time they issued the check showed that they were overdrawn \$661.93 and that before the check was paid a note was given based against the assignment of the B street estimate and that the check was taken care of from the proceeds of the note.

There was another payment of \$1000.00 made on October 10, 1911, which is defendant's "Exhibit No. 2," about which there can be no contention and which counsel do not seriously question in their brief. The lower court in its decision in passing upon this particular payment, says, 215 Fed. Rep., 618:

"A short time before Rector & Daly abandoned the contract to the sureties plaintiff refused to surrender one of the barges of rock now in suit until \$1000 was paid, for which amount one of the checks in question was given; this alone is sufficient to show that it should be applied in part payment of this account."

There is some contradiction of the testimony upon this check, but here the court had the witnesses before it and an opportunity of weighing their testimony and passing upon their credibility and after hearing them testify uses the language which we have just quoted.

The officers of the plaintiff corporation deny that

this particular payment was made as contended for by the defendants, but the evidence is overwhelming that the finding of the court as stated above was justified and is borne out by all of the circumstances surrounding the delivery of this particular barge of rock. The evidence discloses that at this time plaintiff was not furnishing any sand or gravel to the contractors, the only material which was being furnished was crushed rock, and according to their testimony there was only a small balance due for sand and gravel.

Rector, a witness called by the plaintiff, on cross-examination, on page 74 of the transcript of record admitted having previously testified at another trial as follows:

“Q. Do you know if any of the portion of the bonds which you received from East B street went to the Columbia Digger Company?

A. I think \$1000.00 went to the Columbia Digger Co.

Q. Credited on its account?

A. I think so.

Q. That is all they ever got out of the East B street improvement?

A. I think so.

Q. What do you base that on?

A. For the reason that we borrowed one thousand

dollars to pay the Columbia Digger Company; the last we borrowed from the Vancouver Trust & Savings Bank, Mr. Daly borrowed that.

Q. That is true, is it not?

A. If I testified to it, it is."

Further examination of this witness will disclose that he substantially admits that the last one thousand dollars was borrowed for the purpose of paying for a barge of rock which was furnished by the plaintiff and which is included in the amount which plaintiff is suing for.

The testimony of Mr. Evans and Mr. Daly shows conclusively that the money represented by defendants' "Exhibit No. 2" was got from the bank for the purpose of making the payment for the barge of rock which plaintiff refused to deliver until the payment was made. This is further strengthened by the fact that in a statement which was rendered to these defendants, which is referred to in the testimony of John J. Caspary on page 133 and which is known as defendants' "Exhibit No. 15," the defendants were given credit on the crushed rock account for \$1000.00 on October 11, 1911; this statement was rendered on November 1st, 1911.

This shows that on November 1st, only about twenty days after the check for \$1000.00 was received, that the plaintiff itself credited this \$1000.00 to the crushed rock account.

This testimony, in connection with the testimony of Mr. Evans and Mr. Daly and Mr. Rector, establishes beyond question that this \$1000 was received by the plaintiff in payment of a barge of rock, and that the defendants are entitled to credit for that amount. These two checks, one for \$1216.25, which was applied by Rector & Daly, the other a check which was drawn for \$1000, which was received in payment for a barge of rock, are beyond any reasonable grounds of dispute, and even counsel in their argument do not seriously question them, if we understand their brief.

The next check about which there is any dispute is defendants' "Exhibit No. 4," dated July 17, 1911, for \$859.90. At the time this check was given the account was overdrawn \$2565.45, and Mr. Evans testifies on page 115 of the transcript of record that this check was paid by a deposit made on July 18th; and that a note was given for \$2079.40 to make up this deposit, and before the note was given Rector & Daly had overdrawn their account \$2565.45; that they gave their note for \$2079.40, which was made up of estimates on Fourth Plain for \$990.40, East B Street \$574.20, and Connecticut Avenue \$514.80. The lower court in passing on this particular check in its decision above referred to held in substance that at least defendants were entitled to a credit of \$574.20, the amount that went into the note that was based upon the estimate coming from this particular

street. This evidence stands entirely without any kind of contradiction and establishes that out of this check, which is defendants' "Exhibit No. 4" the defendants were entitled to a credit of \$574.20.

Defendants' "Exhibit No. 5" was a check for \$1017.49. Mr. Evans testifies, transcript pages 110, 111 and 112, with reference to this payment that at the time this check was issued several other checks were drawn by Rector & Daly and that their account was overdrawn \$1327.79 and that in order to pay the note Rector executed a note to the bank for \$2300.00. This was entered on the note record of the bank as follows: "Entered on July 7th; Rector & Daly endorsers; security collateral estimates East B Street No. 811, dated July 6th, 1911, payable on demand, \$2300.00, nine per cent interest."

Thus the Court will see that at the time this check was paid it was paid out of funds which were secured by these estimates on this street, and that at that time there were no other funds out of which it could be paid, but it was directly paid by an advancement which the bank made, based upon the estimates made upon East B Street. This record stands undisputed and there is no contradiction but that this check was paid out of money which was advanced by the bank to Rector & Daly and based upon a note which was secured by assignments of estimates on East B Street.

The next payment was the sum of \$3000.00 paid on September 6th, 1911. At the time this check was presented it was marked not paid for want of sufficient funds; and at that time there was a balance to the credit of Rector & Daly as testified to by Mr. Evans on page 114 of the transcript of record, amounting to the sum of \$375.88, and that in order to meet the payment of this check which had been refused payment because of insufficient funds Rector gave his note to the bank for the sum of \$4000.00 against the estimates on East B Street and the money was paid based upon that estimate. No one testified to the contrary and that testimony stands uncontradicted.

The next check, in the order in which we are considering them, was dated June 23rd, for \$501.64. At the time this check was paid Mr. Evans testifies on pages 115 and 116 of the transcript of record that the contractors had overdrawn their account at the bank and that they gave the bank a note for \$5770.00, secured by estimates for work done on East B Street and \$1115.75 in money that was paid in, so that at least a portion of this check should be chargeable to this fund. But, leaving out of consideration this check, we have the payment of \$1216.25, Exhibit No. 1; \$1000.00, Exhibit No. 2; \$574.20, Exhibit No. 4; \$1017.49, Exhibit No. 5; \$3000.00, Exhibit No. 6, making a total of \$6807.94, and the original amount sued for in this action was

\$6189.88, making an excess of payment amounting to \$618.06. Thus, leaving out the \$501.64, defendants' Exhibit No. 7, there would be sufficient, and more than sufficient, without considering the \$574.20 which was included in Exhibit No. 4, to offset plaintiff's claim.

It is our contention that a careful examination of the record and the surrounding circumstances will convince the court that the plaintiff had an agreement with Rector & Daly that the moneys which they received from Rector & Daly from this improvement should be applied toward the payment of the unsecured claims and the plaintiff would look to the bond to secure the payment for the crushed rock. Every circumstance indicates this.

It is evident that the plaintiff was aware of the financial condition of these contractors and was unwilling to trust them to any considerable extent. The officers of the plaintiff corporation have testified, as heretofore cited by us, that they would not furnish this rock until after they had made an investigation and found that there was a bond with responsible sureties which they could look to to secure payment.

It also appears from their testimony that they were buying this crushed rock from a gentleman by the name of Hume and had to pay for it, and that they were unwilling to furnish it until they knew they were amply secured.

The testimony already quoted discloses that the plaintiff was to be paid for the sand and gravel first, and was to look to the bond as security for the payment for the crushed rock because, as the witness Hackett says in his testimony, that before he would furnish any crushed rock he came to Vancouver and learned that there was a good and sufficient bond to secure payment for the crushed rock. We submit then that it is fair to conclude that Hackett having this knowledge that plaintiff was amply secured for the crushed rock, then representing the plaintiff corporation, made this arrangement with Rector & Daly to furnish them sand and gravel, and that they would pay him for it as they went along, because he was unwilling to trust them for any large amount, but that he would trust them for the crushed rock because he felt the plaintiff was amply secured under the bond.

On pages 37 and 38 of the transcript of record, on cross-examination, Mr. Hackett testifies as follows with reference to a conversation had with Rector over the application of the payment of the check for \$1216.25: "We are not expecting any money on the rock, and we want our sand and gravel paid for first." What does that mean? It simply means that he would not take chances on the payment for sand and gravel, but wanted his money for that first because he had the bond to rely

upon for the crushed rock; indeed, this is what he admits.

Again quoting from the same witness on page 38:

“Q. This was given you as payment for crushed rock which went on East B street, wasn't it?

A. Well, I told Mr. Rector that I wanted to pay for my sand and gravel first, that I had no security for it.

Q. That is the idea exactly.

A. And that this check had marked on it ‘for crushed rock’ and that I did not want that; that I wanted him to pay me for the sand and gravel,” etc.

This, we think, clearly shows that our contention that plaintiff expected and intended to apply all payments received by it from whatever source to the unsecured claim, and, as shown by the testimony, refused to make any other application until the sand and gravel were paid for.

Again, we call the court's attention to the testimony of Mr. Rector, on pages 86 and 87 of the transcript; he admitted that this testimony was given in the trial of the case of *Sparks & Blurock vs. Vancouver Trust & Savings Bank*, in the superior court of Washington.

“Q. Did you have an arrangement with the Columbia Digger Company that you should do that and let the crushed rock account stand because you had a bond to protect you?

A. I think probably we did.”

Again

“Q. When did you make this arrangement with the Columbia Digger Company that cash should go on the sand and gravel and the bondsmen stand for the crushed rock?

A. May or June, 1911.”

This testimony of Rector is in keeping with the conduct of the plaintiff and is substantiated and corroborated by all of the circumstances surrounding this matter.

As further evidence of this arrangement we would call the court's attention to the testimony of Caspary, the bookkeeper for plaintiff, on pages 70 and 71 of the transcript. An examination of his testimony will disclose that on July 10th they received a check from Rector & Daly on account of crushed rock amounting to \$662.50. This is the check which later plaintiff credited to the rock account, but at the time this check was received, as shown from the testimony of this witness and by reference to Exhibit No. 15 at the top of page 182 of the

transcript this check was credited to the sand and gravel account and was never credited to the rock account until after preparation was made for this suit.

As further evidence of this we would call the court's attention to plaintiff's Exhibit No. 16. This was the statement furnished by plaintiff to the defendant on December 30, 1911, for the balance due for crushed rock and in that statement there is a claim for this 530 yards of crushed rock at \$1.25 per yard, amounting to \$662.50. The bookkeeper has undertaken to explain that he made a mistake, but the plaintiff failed to produce any books showing any application of these payments, and these statements were rendered as copies of the books and show how the plaintiff was applying these payments as they were made and the reasons for it.

This testimony must convince the court that it was the intention of the plaintiff not to credit any payments upon crushed rock, although the check was received in payment for a barge of crushed rock amounting to just this sum, until after all of the sand and gravel had been paid for; and the same was true of the check for \$1216.25, being defendants' Exhibit No. 2. As already noted, this check had endorsed on it that it was a payment for a barge of rock amounting to just this sum, but the plaintiff upon noticing this endorsement refused to apply it in that manner until after the sand and gravel account was paid for.

The evidence and all of these circumstances must convince the court that the plaintiff had an understanding and followed out the plan of using the money that came from payments made on this improvement, towards the settlement of the unsecured claims and did so at the time with the intention of relying upon the bond as security for the payment of the crushed rock. But it is our position that it is not necessary for us to show that such an arrangement was previously entered into, if, as a matter of fact, the money which the plaintiff received came from this improvement, for then plaintiff was bound to apply it towards the payment for the material which went upon this street and could not apply it toward the unsecured general account, or towards any other indebtedness due from Rector & Daly.

The lower court did not make any finding that plaintiff knew that the payments in question were, in fact, realized under the contract with the city, for the court was of the opinion that such a finding was not necessary; but the court did say, quoting from its decision, "Knowing these things would doubtless constitute reasonable grounds for belief upon his part that such payments were from that source and was enough to put him upon inquiry as to the source from which they were derived."

The court here refers to the fact that part of the checks were marked "for crushed rock" and the fact that in the testimony of Mr. Hackett, president of the

plaintiff corporation, he explained that the agreement was that the rock was to be paid for as soon as Rector & Daly got their money off of B street. In further proof of the fact that plaintiff knew that money was being received by Rector & Daly from this improvement we would call the court's attention to the fact that the plaintiff knew that this work was being prosecuted as a public improvement and that the statutory bond mentioned had been given, because he says that before he would furnish any rock he came to Vancouver and learned about the bond and the financial responsibility of the sureties.

The contract which this bond was given to secure provided for monthly payments based upon the estimates of the City Engineer. This contract was a matter of public record on file in the City's Clerk's office and was the very contract which these sureties had undertaken to guarantee performance, and we contend that it is a matter of general custom prevailing throughout this section to such an extent that plaintiff is deemed to have had notice of it, that the payments on public contracts of this character are made from time to time on estimates given by the engineer in charge; besides, the plaintiff was furnishing materials for the performance of the contract and is bound to take notice of the terms and conditions of the contract and in legal effect had notice of its terms and conditions and was bound by all

of its provisions, and one of its provisions was that payments were to be made from time to time based upon estimates of the engineer.

The liability of the sureties was measured by the statutes providing for the giving of this bond and the provisions of the contract and one dealing with the contractor was bound to take notice of the provisions of the contract so far as the rights of the sureties are concerned. We will call the attention of the court to the fact that there was no contractual relations existing between these parties, and that persons furnishing material or labor were protected only by reason of the giving of this bond. It is our position that the bond and contract must be construed together and the plaintiff must be held to have been aware of its provisions. Before the plaintiff would furnish any rock for this improvement it satisfied itself of the financial responsibility of the bondsmen and doubtless knew of the financial condition of the contractors.

How did it expect that these contractors were going to perform this entire contract without receiving payments from time to time, in their financial condition? The plaintiff itself refused to deliver any crushed rock without knowing in advance that it was protected by this bond, and it is fair to assume then that other persons furnishing material would be equally cautious. Could plaintiff expect this contract could be carried on and this

large public improvement completed if no payments were made from time to time in order to meet the pay-roll and part payments for material that was being used? We submit the long experience shown to have been had by the officers of plaintiff, and the prevailing custom of handling such matters in this vicinity could not permit of such a conclusion. This contract, as was customary in similar contracts, provided for payments amounting to eighty per cent as the work progressed. The plaintiff knew of this custom, must have known of it, because it appears that the plaintiff is engaged in furnishing material for works of this character and as we have already stated was bound to take notice of this provision of the contract so far as the rights of these sureties are concerned. In addition to that we have the fact, to which we have already called the court's attention, that the plaintiff received a check, on the 10th of July, for \$662.50, which was payment for a barge of rock which went upon this street and which plaintiff knew, according to the testimony of its witnesses, was intended to be a payment for a barge of rock, although it was credited on the sand and gravel account at that time. Plaintiff now is contending that that was a mistake, that it was intended to be credited to the rock account at the time it was made. Again when the check for \$1216.25 which had the endorsement upon it that it was for crushed rock was paid,

plaintiff knew that payments were intended to be made for the crushed rock, but it refused to accept it on that account, according to the testimony of Mr. Hackett. And when the last payment of \$1000.000 was received on October 11th plaintiff credited it to the crushed rock account, as shown by Exhibit No. 15. All of these circumstances clearly indicate that plaintiff knew that the payments were intended to be made on the crushed rock, and in fact were made by the contractors for the rock which went upon this street, but plaintiff refused to so apply them according to its contention at this time, but plaintiff admits that at least the two checks first mentioned were intended to be payments upon the crushed rock. Before the work commenced upon this improvement the contractors had assigned to the Vancouver Trust & Savings Bank the money coming to them on account of this improvement under the agreement heretofore mentioned; and that assignment was a matter of public record in the City Clerk's office, all of the checks received by the plaintiff being paid by the Vancouver Trust & Savings Bank. Here was the assignment of record of the money coming from this improvement to this bank, and payments made by the bank to the plaintiff. During the time that these checks were received plaintiff was not furnishing crushed rock to these parties for any other improvement, so plaintiff knew that these checks were intended to be in payment for crushed rock

which had been furnished upon this street, two of the checks corresponded in amount to deliveries which were furnished for this street.

These circumstances when taken in connection with the testimony of Hackett, Caspary and Rector, must convince the court that these parties were thoroughly familiar with what was being done and kept themselves thoroughly familiar with this improvement and the progress that was being made upon it, and knew that payments were being made by the city from time to time upon the engineer's estimates; they may not have known that the money which it received came directly from the city on account of this improvement, but they did know that they had an arrangement with Rector & Daly that whatever money Rector & Daly paid, whether it came from the city on account of this improvement or otherwise, would be applied on the sand and gravel account first, and they must have known that Rector & Daly were receiving money from the city as the work progressed.

The plaintiff has undertaken to deny that there was an agreement that the money which came from this particular improvement should be applied upon the sand and gravel account, but this contention is met and overcome by the testimony of Mr. Hackett himself and the other witnesses. He testifies, as already cited by us, that the arrangement with Rector & Daly was that the sand

and gravel account must be paid first, it made no difference to him where the money came from, the sand and gravel account was to be paid and the rock account was to be allowed to run and when checks were received for the payment of the rock plaintiff refused to accept them, insisting that the sand and gravel account must be paid first.

It seems to us that the court cannot avoid the conclusion from this testimony that the sole aim and purpose of the plaintiff was to keep the sand and gravel account paid up and to rely upon the bond for payment of the material which went into this street.

But we do not need to burden the court with an examination of the record to justify the contention which we have been making above, for this case can be disposed of and the judgment of the lower court affirmed upon the testimony of Captain Hackett, president and manager of the plaintiff corporation. The lower court, in its decision on this subject, quoted the testimony of Captain Hackett as taken from the transcript of his testimony. We have already quoted portions of this testimony and will not repeat it, but for the convenience of the court we will repeat the latter part of the quotation:

“I called Mr. Hume and we went over to Vancouver and saw Mr. Rector and he said that he could not pay cash for the crushed rock, but as soon

as he got his money off of B street, why, he would pay us for the crushed rock, and that he would have to ask us to wait for money until he did get his money from B street, and we asked him what surety we would have if we waited for our money and said that he had a bond to the city to pay for all labor and materials, a good bond, and mentioned who was on the bond, Mr. Blurock and a man named Sparks, I think, and so under those conditions we thought we were perfectly safe in furnishing him the rock and waiting until he got his money off B street, so we began to make deliveries as soon as we could."

In substance this is testified to again by this witness on pages 37 and 38 where the question came up relative to the application of the \$1216.25 check, and again on page 41 in the testimony of the same witness, and again on page 43, so that if we take this statement of Captain Hackett as the basis of the agreement which was made between him and Rector & Daly relative to the time and manner of payment for the crushed rock, we have this condition; that plaintiff would wait for its money until Rector & Daly got their money from B street. The agreement, then, was that when they drew their payments from the city on account of this improvement that plaintiff was to be paid for the crushed rock; and he does not here state that the agreement was that the

plaintiff was to wait until the entire work was completed and permit the plaintiff to draw this money and apply it on the sand and gravel account, he denies that that was the arrangement, although the evidence shows that was the real understanding, but it contends in effect that the contractors might proceed with this improvement and whatever money they might draw from the city on account of this improvement while the work progressed was not a matter of concern for the plaintiff so long as the sand and gravel account was kept paid because plaintiff was to wait until the contractors were paid by the city and Captain Hackett now says that he expected to wait until the entire work was completed and that he was not doing this relying upon the bond, but was waiting until the contractors received payment from the city. This contention puts plaintiff in an absurd position. In the first place he stated that the plaintiff would not furnish the material without the security of the bond, then Captain Hackett says that they were not relying upon the bond but were waiting for the contractors to get their money from the city; in the meantime all the money which the contractors were paid by the city and which was paid to the plaintiff was applied to the sand and gravel account by plaintiff. The fact is that plaintiff was relying upon the bond and sold the sand and gravel to the contractors and took the money which it received and applied it on that account, knowing that

there was a bond which protected the plaintiff for the material which went into the street; but if the contract which plaintiff claimed it had was to the effect that it should be paid when the contractors received their money from the city, then when this money was received from the city and paid to plaintiff that contract was performed and plaintiff cannot apply the money received in payment of the contract to other unsecured accounts to the prejudice of the sureties. Here the contractors performed the contract which the sureties agreed they would perform by paying the money to the plaintiff according to the terms and conditions of the agreement which plaintiff claims it had with the contractors; now it takes the position that although this money was paid by the city to the contractor for this crushed rock and that the contractor paid it to the plaintiff, that because it was paid before the final completion of the contract that it has the right to apply it in a different way.

Supposing no bond had been given under the provisions of the statute and Mr. Hackett was furnishing rock to Mr. Rector to be paid for when he received his money from the city, can it be contended that he would have allowed the money to be paid to Rector & Daly from time to time as the work progressed and wait until they had been fully paid before he would have made inquiry as to what was becoming of the money that they were receiving from the improvement, or what provision they

were making for its payment? Certainly not, in view of the fact that it was apparent from the testimony that Captain Hackett did not regard these contractors as financially sound. If no bond had been given Captain Hackett would have known all about the payments and when the payments were to be made, and where they were coming from because he said that he bought this rock from Mr. Hume and had to pay cash for it and he would not have permitted this account to run on until the entire work was completed and then trusted to the contractors to make payment, but would have insisted, as he did, for the sand and gravel, that payments should be made promptly as the material was furnished. This must convince the court that he was trusting to the bond and taking money which the contractors were receiving from this improvement and applying it on the sand and gravel account.

The contract, according to Captain Hackett, was that the sand and gravel account should be paid from the general account of Rector & Daly, but that the crushed rock account should be paid with money which Rector & Daly received from the city on account of this improvement; that is the contract which the sureties undertook to guarantee; that was complied with when payments were made, and plaintiff is not now in a position to urge that it had a right to use the payments which were made from time to time on account of this

improvement in satisfaction of unsecured claims and that it had a right to wait until the entire completion of the improvement and if there was any balance due from the crushed rock to apply it on that debt and if there were no balance then to hold the sureties liable; that is its contention in face of the fact that its witnesses have testified that payments were to be made to it when the contractors received money from the city.

The lower court takes notice of this question and we think that its decision upon this point is absolutely sound and cannot be overcome by reason or authorities. Quoting from this decision:

“ ‘As soon as he got his money’ means ‘immediately upon getting the money.’ 1 Words & Phrases, page 527. It does not mean ‘As soon as he got *all* his money,’ It means no more than to say ‘As soon as he got money,’ ‘the money,’ ‘sufficient money,’ and there is nothing in the circumstances to warrant the inference that the entire contract would have to be completed before any money was paid on it, more than to suppose that it would be paid for as the work progressed, and especially would this be true after the receipt by the plaintiff of the first check marked ‘crushed rock.’ The presumption would follow that the contract being that it was to be paid for as soon as the money was received under the contract with the city, that was the source from

which the payment by the marked check was being made. If plaintiff was mistaken both in supposing that the money would not be paid until the completion of the contract and in not understanding that the payments made came 'off of B street,' it was a mistake for which the defendants' sureties were in no way responsible; and where the payments from this source were diverted from that part of the account to which it was understood they would be applied, intentionally or mistakenly, it is nothing for which the sureties were responsible, this being a contract plaintiff made and to secure the performance of which the bond was given, and it being in substantial accord with what the courts have held to be equitable under such circumstances there would be no authority in the principals to that contract to change it so manifestly to the sureties' disadvantage, without releasing them to the extent of the diversion. What the principals could not do directly they should not be allowed to do indirectly."

As above stated, we think that the position taken by the lower court upon this phase of the case disposes of the appeal and will warrant the affirmation of the judgment.

Counsel in their brief do not attack this position of

the court and have not in any manner met the conclusion which the court reached in its consideration of this part of the case.

They have discussed various decisions and rules but in no place have we been able to find any argument or contention which could explain away the conclusion which we think must be drawn from the position which plaintiff has placed itself in by the testimony of Captain Hackett as to the agreement which he claims was made between Rector and himself as to when the payments should be made for the crushed rock.

Counsel contend that the defendants have failed to show the money which plaintiff received came from the city on account of this improvement. The evidence stands uncontradicted that before entering upon this public work the contractors assigned the money to be received from the improvement to the Vancouver Trust & Savings Bank, that each of the checks which plaintiff received so far as this case is concerned were paid by the Vancouver Trust & Savings Bank and that all the money which plaintiff received aggregating an amount in excess of the claim for the material furnished which went into this street was money paid by the Vancouver Trust & Savings Bank; the evidence stands uncontradicted that this money was paid from credit received by the giving of notes by Rector & Daly based upon the estimate of this street and to be paid out of the estimate

of the street as the estimates were received from time to time. We have traced the credit from the contractors to the bank; we have traced the cash payments from the city to the bank, of \$10,046.17, Exhibit No. 9, of bonds which under an agreement with the contractors were to be sold at a discount and cash received from the sale of the bonds to be used on account of this improvement to the credit of Rector & Daly. The bonds so received amounting in the aggregate to \$11,500.00, being defendants' Exhibits 10, 11 and 12; these were sold at a discount of $12\frac{1}{2}\%$. In addition to that we have shown that the bank received on this account several thousand dollars due on account of final payment of the street and which resulted in litigation between Sparks & Blurock and the Vancouver Trust and Savings Bank.

The record will disclose that although Rector & Daly had a general checking account with the bank that at the time the checks which went to plaintiff were paid there were no funds to the credit of the contractors and that before any of the checks were paid a note was given to the bank by Rector & Daly to cover the amount of the payment and that the note was made a specific charge against this B street improvement. There was no evidence offered to the contrary; and the testimony of Mr. Evans on this subject was competent; the books were present in the court room about which he was testifying and there are no possible grounds for the contention

of counsel that this evidence was incompetent; they make no suggestion which would make it incompetent except that some of the matters that he testified about were not within his personal knowledge, but the books were present in court, books kept in the ordinary course of business, the books containing these accounts in this matter and the part of his testimony which referred to these notes was within his personal knowledge or appeared from the records of the bank, and the original records of the transaction. This was clearly competent, and this evidence together with the records clearly established the facts as given above.

The lower court in passing on this matter used this language:

“The foregoing is sufficient to show the substantial identity of the money paid plaintiff with that realized by Rector & Daly under their contract with the city. Plaintiff contends that it was not realized from this work, that the money paid plaintiff was raised by Rector & Daly upon their credit and that no money was paid by the city until long after the payments to plaintiff. If such an exact identity in the fund were ever required it would be seldom attained. If this money advanced to Rector & Daly was not realized from this work, then Rector & Daly never obtained any money under it, yet they had, and disbursed thousands of dollars ad-

vanced under the obligations for that work and so realized under it.”

This quotation is from the court who tried this cause, and after it had had the witnesses personally before it and after full opportunity of passing upon the competency of the testimony which went to show the identity of the note. The law does not require in order to relieve the sureties that they show that the identical money which the city paid for the improvement was received by the materialman, it is sufficient to show that the money was paid to the contractor and by him placed to his credit in the bank and that the materialman was paid from this credit. It is not necessary that the same identical piece of coin should pass from the city to the materialman, but if the money is paid to the contractor and he places it in the bank to his credit and from that credit pays the materialman this is sufficient to establish payment. The evidence in this case does not disclose any commingling of the funds received from the city on account of this improvement with other funds of the contractors; the contractors had no funds at the time these checks were paid, they had no funds that could be commingled with the money received from the city. The money was not received at the time the checks were paid, but under the agreement between the bank and Rector & Daly the bank was to advance the money to Rector

& Daly based upon the engineer's estimates; the checks were paid directly against these advancements, the money was not paid out of a general account commingled with other funds because, as before stated, these contractors at the time the checks were paid had no funds; in each instance they were overdrawn and it was necessary to give a note based upon estimates from this street in order to pay the checks.

The courts hold that it was necessary for us to show with reasonable certainty that the money received by the bank which paid these checks came from the city. There is no question of reasonable certainty here, there is no dispute, no contradiction, the evidence is plain just how these checks were paid and it stands unimpeached that they were paid from money derived against the estimates on this street under the agreement which the bank had with Rector & Daly. A clearer case of following funds from the city to the materialman could hardly be conceived unless you took the original coin and passed from the city to the materialman, which is not required.

In the case of *Merchants Insurance Co. vs. Herber*, 71 N. W. 624, this question is discussed, and the court here says:

“We are not to be understood as holding that it was necessary for the surety to show that the identical money received for such premium was applied

in payment of the checks. It would have been sufficient for him to have shown that money was in fact collected for such premiums and paid into the common fund in the bank and that it remained a part thereof until the checks were paid. The burden was on the surety to establish with reasonable certainty that the money received for the premiums for which he was liable on his bond was in fact a part of such common fund and was used to pay the prior indebtedness of his principal."

Here the court says that it was necessary to show with reasonable certainty that the money for which the surety was liable was in fact a part of such common fund and so used to pay the prior indebtedness of his principal. In the case at bar there was no other fund, or funds; and all checks were paid from money advanced by the bank on account of the improvement; and hence there is no question of commingling of funds in this case, there being as above stated, but the one fund.

Again, in a concurring opinion in this same case, the concurring judge used this language:

"True it appears the trust fund received by Herber from various sources together with his commissions were deposited in one account in the bank and thereby commingled. Plaintiff would have a right to trace the moneys belonging to it into this

common fund and recover them back out of it, and these sureties also have a right to trace into this fund and out of it the money received of Herber for which these sureties are liable.”

We have traced the money from the city into the fund and out of it and have shown from what source the money came which went to the plaintiff for which these sureties are liable.

On pages 29-33 of their brief counsel have cited the court to a number of decisions which establish a rule which counsel contend is decisive of this case.

The rule as given by counsel on page 32 is that money has no ear-marks and that where money is wrongfully received and paid by the wrongdoer in payment of his own debt the court cannot disturb the application of such payment where the person receiving the money had no knowledge of the owner's rights, even though the money is received in payment of an existing debt. Some of the decisions cited by counsel establish this rule and we have no quarrel with counsel over the rule as it is enunciated in these decisions, but the rule has no application in this case. It is true that when a person pays money which he has wrongfully acquired that such payments cannot be followed and the person receiving the money held responsible for it where he had no knowledge of where

the money came from but that rule has no application here.

We are not seeking to recover money from the plaintiff which Rector & Daly wrongfully received from some source and gave to the plaintiff in payment for a debt, but here the sureties agreed that Rector & Daly would pay the plaintiff for the material which it furnished which went into this improvement and we have a right to show that they have made such payment and for that purpose we may show where the money came from which Rector & Daly used in making the payments in question.

These sureties did not undertake to secure the payment of promiscuous claims which might be due and unsecured from Rector & Daly, or any claims other than the one which was the subject of the contract, viz., claims for the improvement of B street, and they have the right to show that their undertaking in this regard has been complied with. If the general rule is as stated by counsel then this case falls without rather than within the reason of the rule and is not governed by the decisions cited by counsel.

There was another principle announced in the case of *Holly vs. Missionary Society*, 180 U. S. 284, which seems to be the leading case cited by counsel on this question which takes from that case its weight as an authority on this question, and that is, that a court of equity will

not transfer a loss that has already fallen upon one innocent party to another party equally innocent, where the equities are equal. In the case at bar there is no such thing as an equality of equities, the plaintiff by the position it has assumed pursued a course which would inevitably require the sureties to pay for the material which went into this street; its conduct in this regard was an actual fraud upon the rights of these sureties. It claimed it had an arrangement that whatever money Rector & Daly paid it should be applied on the sand and gravel account, a debt for which these sureties were not responsible, and when it received payment for rock furnished, it refused to accept a check but insisted that such payment should be applied on a debt for which the sureties were not liable. Such a course was bound to ultimately force the sureties to pay the plaintiff for the material which went on this street, because if the contractor was using the money which came from this street and paying it to plaintiff for other debts then the fund which came from this improvement would be exhausted and plaintiff would be forced to rely upon its bond, which it is doing. In making this arrangement with the contractor without the knowledge of the sureties it was perpetrating a legal fraud upon these sureties and certainly it is not entitled to any consideration so far as the equities of the matter are concerned.

Where the rights of third parties, such as sureties, are involved, the courts have not followed the rule announced by counsel, but permit evidence to show out of what funds the payments were made.

In *U. S. vs. January*, 7 Cranch 572; 2 Curtis' Rep. 673, the Supreme Court of the United States in passing upon the liabilities of sureties on official bonds for different periods of time for the same officer, used this language:

“It will be generally admitted that moneys arising, due and collected subsequently to the execution of the second bond cannot be applied to the discharge of the first bond without manifest injury to the sureties in the second bond; and vice versa, justice between the different sureties can only be done by reference to the collector's books and the evidence which they contain may be supported by parol testimony, if any, in possession of the parties interested.”

In *First National Bank vs. National Security Co.*, 131 Fed. 401, the Circuit Court of Appeals, speaking through Justice, then Judge, Lurton, used this language:

“But this is not Clayton's case and is quite distinguishable from it, by reason of the fact that this is not a question as to the fund out of which a check

is presumably paid; but one of the application of deposits and the more important fact that the rights and equities of a surety for a limited period cannot be ignored when we come to the appropriation of payments.”

And again,

“The general rule of applying every unappropriated payment to the oldest item of debt is subject to qualification where the rights and equities of third persons are involved.”

Counsel have cited in support of the rule mentioned above the case of *Tanner vs. Lee*, 49 S. E. 592. We have not this case at hand and are not in a position to examine it, but in the case of *Young vs. Swan*, reported in 69 N. W. 566, the Supreme Court of Iowa held exactly the contrary to what counsel states is held in *Tanner vs. Lee*. The court says:

“The wife furnished the husband money with which to buy a bill of lumber. The husband goes to a materialman with whom he has a general account, purchases the lumber, pays the money which his wife has given him to the merchant and the merchant applies it upon the general account. Can he now in an action to establish and foreclose a mechanic’s lien against the property of the wife, insist

that these payments with the wife's money shall be applied upon the husband's general account to the detriment of the wife? We think not."

This case applies with considerable force to the question now before the court because the bond stands in place of the property upon which a lien could be enforced and takes the place of the lien. Here, the sureties undertook that Rector & Daly would pay for this material; they did pay for it from the fund on account of which the sureties became liable, but the plaintiff is attempting to apply it on the general account. The court did not base this case upon any question of notice as to where the money came from, it simply held that the money belonging to the wife could not be misappropriated in that manner.

In *Crane Bros. Manufacturing Co. vs. Keck*, 53 N. W. 606, the Supreme Court of Nebraska said:

"As between the debtor and creditor there is no doubt but the rule that where a debtor fails to designate a debt, where there are several debts upon which a payment may be applied, the creditor may apply it; where, however, the rights of third parties intervene the rule does not apply. Thus, where A was a creditor of a firm, and also of a surviving partner thereof, individually, and the latter made

a payment out of funds belonging to the firm without designating the debt on which it should be applied it was held that as the funds belonged to the firm they must be applied to the partnership debt."

In *Lee vs. Storz Brewing Co.*, 106 N. W. 220, the Supreme Court of Nebraska affirmed the decision last cited and held that

"Where the money was received by the debtor from a third party whose property would be liable for the debt in case the money was not applied upon the third party's liability there was an exception to the general rule."

From a review of the decisions where the rights of sureties have been involved on official bonds and other similar liabilities the court will see that the rule cited by counsel has not been followed but that evidence has been permitted to show the source from which the payments were made.

Next considering the principles which govern the court in determining the application to be made of the payments in question, we would call the court's attention to this principle of law, that

"In making application of payments the principles of equity are recognized at law so far as the

nature of the proceeding will admit. 30 *Cyc.* 1240 (3).

The general rule is that where no appropriation of the payment has been made by either debtor or creditor of a payment the law will apply the same according to the principles of justice and equity in the particular case, provided there are no other parties interested, and while the word "equity" is used by the courts when expressing a rule given by them they apply it in the sense of the word right and justice and other words of the same import, and in the enforcement of the principle apply it to legal defenses.

A rule which we contend applies to the case now under consideration is analagous and governed by the same rules which apply where neither debtor or creditor has made application and the court makes it according to the principles of justice and equity.

Under this rule the law makes the application and the parties are not at liberty to make a different one from that which the law establishes as the correct rule governing situations and transactions of this character and the court follows the law in making application, the law makes it according to the rule of justice and equity.

This principle was very early adopted by Supreme Court of the United States and has been uniformly ad-

hered to by that court. In the case of *U. S. vs. Kirkpatrick*, 9 Wheaton' 720, 6 Curtis 244, the court used this language:

"The general doctrine is that the debtor has the right if he pleases to make an appropriation of payments, if he omits it a creditor may make it, if both omit it the law will apply the payments according to its own notions of justice."

The court speaks for the law and makes the application according to the law's views of justice.

In the case of *U. S. vs. January, supra*, the same rule was followed.

"The general rule is that the court will make the application in such a manner in view of all the circumstances of the case as is most in accord with justice and equity and will best protect and maintain the rights of both debtor and creditor." 30 *Cyc.* 1240.

"Equitable principles so far as applicable to our conditions and not changed by statute have been adopted as a part of our common law. * * * It has been held that whenever a right claimed under the rules of common law has been denied, governed or controlled by the principles administered by the

courts of equity the latter will prevail over the former and it is the duty of the courts in administering justice to decide and render judgment accordingly.”

There is another principle of law which we desire to call the court’s attention to and which we think is very important in the consideration of this case, and if our view of the testimony is correct it is of controlling importance, and that is this:

“It is a familiar law that any change in the contract of a surety or in a contract for the performance of which surety agrees to be liable whereby attempt is made to increase his contractual liability without his consent, releases the surety.”

This quotation is taken from the case of *Eberhart vs. U. S.*, 204 Fed. 884, and in support of the rule three decisions are cited; one of these is *Reese vs. U. S.*, 9 Wallace 13. The decision is by Justice Field. In this case a bond was given for the appearance of persons charged with a crime. The government without the consent of the sureties entered into a stipulation that the defendants might depart without the territory of the United States into foreign countries and remain there until certain civil cases pending in another court were disposed of,

The Supreme Court of the United States held that by this action on the part of the government the sureties were released. This quotation is taken from this decision:

“And the law on these matters is perfectly well settled. Any change in the contract on which they are sureties made by the principal parties to it, without their assent, discharges them.”

Another case cited in support of this rule is *Smith vs. U. S.*, 2 Wallace 219.

“Any variation in the agreement to which the surety has subscribed which is made without the surety’s consent and which may prejudice him or which may amount to the substitution of a new agreement for the one he subscribed will discharge the surety.”

As already quoted Rector while testifying in the case tried in the superior court here at Vancouver admitted that an arrangement was made with the Columbia Digger Company that the money which the contractors received should go on the sand and gravel and the bondsmen stand for the crushed rock. Captain Hackett in testifying for the plaintiff denies that arrangement but does state that the sand and gravel was to be paid in full and the rock account was to run, and he also testified

that he came to Vancouver and ascertained that there was a good and sufficient bond which would secure him for the rock; he further testifies that when he received a payment upon the crushed rock that he refused to accept it as such but insisted that it should be applied on the sand and gravel account. It thus appears plain that it was the arrangement between these parties that the sand and gravel account should be kept paid in full regardless of where the money came from and that the plaintiff would rely upon the bond.

The sureties undertook that Rector & Daly would pay for the material which went into this street, but for nothing else. Here the plaintiff and the contractors adopted a course which was bound to render the sureties liable on their bond, because they were taking the money which came from this improvement and applying it on another debt. This agreement which plaintiff had with the contractors in effect extended the liability of the sureties and by reason of this arrangement imposed a liability upon them from which there was no escape if they were permitted to carry out the arrangement which plaintiff undertook to carry out and which it is now contending it had the right to carry out. This constituted a variation in the agreement which necessarily prejudiced them and which amounts to a substitution of a new agreement for the one they signed and under the decisions cited releases them from liability.

The rights of sureties under these statutory bonds have been determined and construed in a number of decisions. One of the earlier and leading cases on this subject is *Prairie State National Bank vs. United States*, 164 U. S. 227, 17 Sup. Ct. 142. In this case the decisions cited above are referred to and with reference to the doctrine of those cases the court says:

“The rulings of this court has been equally emphatic in upholding the right of a surety to stand upon an agreement with reference to which he entered into his contract of suretyship and to exact strict compliance with its stipulations.”

The court in this case held that the sureties on a government contractor's bond were entitled to be subrogated to the rights of the government over an assignee of the contractor for the money retained by the government and not yet paid to the contractor.

This decision is quoted by this court in *First National Bank of Seattle vs. City Trust, Safe Deposit & Surety Co.*, 114 Fed. 529. This last decision was an action against a surety under a bond given under the provisions of the statutes of Washington and under the same statutes which are involved in the case now under consideration. This court held that the surety was subrogated to the extent necessary to protect it from loss, to all the rights which the city might have asserted against the

funds in its hand and was not limited to the sum reserved by the city until the completion of the contract, but extended to the entire sum and was superior to an assignment made by the contractor and that the surety's right was superior in law and equity to that of the bank under its assignment, and, referring to the case of *Prairie State National Bank vs. U. S.*, supra, used this language:

“The court held, however, that the claim and equity of the surety arose when he entered into the contract of suretyship and that his right to the reserve fund was prior and paramount to that of the bank, and said that the stipulation in the building contract for the retention until the completion of the work of a certain portion of the consideration ‘is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; *that it raises an equity in the surety in the fund to be created.*’ ”

This court further held:

“It is clear that the lien of the surety company upon all funds now retained in possession of the city applicable upon the contract had its inception at the time when it entered into the contract of suretyship and that subsequent to that date the contractors McCauley & Delaney had no power to

create a lien upon the payments to be made by the city and make it paramount to the lien of the surety."

And again:

"One who becomes a surety for the principal upon such a contract as is disclosed in this case may not be deprived of his lien by the secret contract or agreement into which his principal may have entered."

The court further held that the contractors undertook to pay all claims for work, labor and material, that the sureties guaranteed that the contractors would pay "all just claims for work, labor and material furnished in the execution of the contract;" the surety's obligation to pay liens and claims outstanding when the contract was abandoned was not limited to the extent of the reserved thirty per cent of the money then earned by the contractors, but it included the full sum of the unpaid claims. This court here holds that the sureties on the bond have an equity in the fund which was to be paid on account of the improvement. If the sureties have an equity which would entitle them to be subrogated to the rights of the city, and if that equity extends to such sums as would protect them for liabilities which they might be called upon to pay, then it seems to us that it

must follow that they have such an equity in the fund which the city pays to the contractor that their rights cannot be ignored when the contractor uses this fund in making payment for the material which is used in the improvement, and this equity which the sureties have in this fund distinguishes these cases from the general rule of the application of payments.

It is contended by counsel that this money belonged to Rector & Daly and they could make such use of it as they might see fit and that any payments that they had made on any other liabilities was no concern of the sureties. That contention of counsel is true as to money which went to other general creditors, but here the sureties agreed that the contractors would pay the plaintiff for his material; they had an equity in the fund to the extent necessary to pay this claim and when the money was received in which they had this equity and was paid to the person on whose account the bond was given, then the rights and equities of the sureties must be taken into account and the materialman cannot use the funds thus received on any other account or to pay unsecured claims against the rights and equities of the sureties.

Counsel in citing their authorities have failed to apply this principle. Some of the cases have discussed the equities of the sureties, but these are not cases where the sureties undertake to see paid a particular debt

growing out of a particular fund in which they have a superior equity.

Here we agree that the contractor will pay for this particular material and we have an equity in the particular fund which the city pays for this material to the contractors and when that particular fund that we have an equity in is received by the person who furnishes the material and on the liability for which we are surety, then the rights and equities of the sureties are superior and must be respected by the materialman and differs from ordinary payments made by the principal on ordinary liabilities, even though the sureties might have equities in the payments.

As was said by Judge Dunbar in the case of *Crane Co. vs. Pacific Heat & Power Co.*, 36 Wash. 95, "This case falls without rather than within the reason of the rule."

Counsel cite *People vs. Powers*, 66 N. W. 215, in support of their contention. This case does support their contention but so far as we have been able to discover is about the only decision which can be found which does, unless it be the case of *Thacker vs. Bullock*, 131 S. W. 271; we have not access to that opinion and are unable to state just what it holds but we assume that it agrees with *People vs. Powers*, and there may be one or two more which to some extent support their contention,

but not directly. *People vs. Powers* is referred to in 32 *Cyc.*, page 171, and the rule as given by *Cyc.* is as follows:

“Where a surety has become responsible for the payment of money by the principal and the latter receives money under his contract which he pays over, the creditor or obligee has no right to apply said payments in any other way than to the relief of the surety.”

This is given as a general rule and decisions cited in support of the rule, and the case of *People vs. Powers*, supra, is given as contrary and is the only decision which *Cyc.* cites as contrary to the rule which is given by the author of that work as the correct rule and one supported by the weight of authority.

Counsel cite 30 *Cyc.* 1250, but we would call the court's attention to the same volume on page 1252; after stating the general rule as cited by counsel the author uses this language:

“These rules are subject to the exception that where the payment, with the knowledge of the creditor, is derived from such third person, or from a fund connected with the *secured debt*, it must be applied thereto.”

And in a note:

“The proceeds of collateral security given to secure a note cannot be applied to other debts of the maker but must be applied on the note to the exoneration of the sureties,” citing *Elizabeth City First National Bank vs. Scott*, 31 S. E. 819.

The case of *Union Trust vs. Casserly*, 86 N. W. 545, cited by counsel, only goes to the extent of holding that where no application is made the creditor may apply the payment on an unsecured claim and file a lien for the last items furnished. This decision is not out of line with what we are contending for because of the distinction which we have attempted to point out to the court heretofore, of the rights of the sureties in this particular fund, which was not present in the case last cited.

Counsel seem to place some importance upon the case of *Crane Co. vs. United States*, 132 Pac. 872.

This case is not in point for the reason that there was no evidence that the payment which the materialman received came from the school district and this point clearly distinguishes this decision from what we are contending to be applicable to this case.

An examination of the other decisions cited by counsel will disclose either this distinction or that they simply

follow the general rule of the application of payments and are not applicable to this particular question.

The lower court in the case at bar cites the case of *Schwartz vs. Gerhardt*, 75 Pac. 698, 44 Ore. 425, in support of the rule that a trust fund does not lose its identity though the money changes semblance and whatsoever form it may have assumed a trust still attaches, whether it remains in the hands of an original trustee or goes into other hands, especially if the other has taken with knowledge of the trust relation. The decision referred to supports this rule, and applying this rule to the fund under consideration the sureties had an equity in the fund, that equity attached when in the hands of the original trustee, viz., the city, and followed it through the bank to the plaintiff.

In support of the principle which we contend should govern this case we would call the court's attention to the case of *Crane Co. vs. Pacific Heat & Power Co.*, 36 Wash. 95. This is the decision which counsel have attempted to distinguish and is the one which the lower court relied upon in its decision upon the merits of this case. The court here says that

“It will be seen from the allegations of the answer in this case that the moneys applied upon the old debts by the respondent were the very moneys for the collection and payment of which the surety was

obligated to the creditor and under the rule announced by them and which seems to us to be the right and equitable rule, the surety is not bound by such application."

The court was here considering the very statutes which are involved in this controversy and had before it the same question. The court cites as supporting its position the case of *Merchant's Insurance Co. vs. Herber*, 68 Minn. 420, 71 N. W. 624, and quotes from that decision the following:

"This rule as thus broadly stated applies to cases only where the principal makes the payment from funds which are his own and free from any equity in favor of the surety to have the money applied in payment of the debt for which he is liable. Hence where the specific money is paid to the creditor and applied on a debt of a principal for which the surety is not held are the very moneys for the collection and payment of which he is obligated to the creditor, he is not bound by such application and is equitably entitled to have the moneys applied to the payment of the debt for which he is surety unless the creditor can show that he has a superior equity to have them applied as they were applied."

The authorities cited by counsel apply to the first

part of this quotation and are applicable to the general proposition as stated in the beginning of the quotation, but are inapplicable to the exception which the quotation notes. The Circuit Court of Appeals of this circuit in the case of *First Nat. Bank vs. City Trust etc. Co.*, 114 Fed. 529, held that there is an equity in favor of the sureties in the money which the city paid for the improvement, therefore we fall within the exception here noted and, the case of *People vs. Powers et al.*, supra, cited by counsel, is not within the rule announced by the decisions of the United States Courts upon this subject.

Here the very payments for which these sureties became responsible were received by the plaintiff and since this court in the cases cited has adopted the rule that the sureties have an equity in the fund under these statutory bonds this case falls squarely within the rules in *Crane Co. vs. Pacific Heat & Power Co.*, and we think is controlled by it. The lower court gave consideration to this case because it was a decision by the highest court of the state upon the rights of sureties given under this statutory bond and the court in passing on this matter used this language:

“And while the declaration of the highest court of the state concerning such rights, equities and policy may not involve the construction of a state law, in the sense of its literal interpretation, yet it is

considered that such decision is entitled to more than ordinary consideration, if it is not absolutely controlling, where, as here, it is not directly opposed to any higher federal precedent.”

Not only is this case not opposed to higher federal precedent, but it is in entire harmony with the federal decisions upon similar bonds.

The cases already cited by us show the tendency of the federal courts in determining the rights of sureties under these statutory bonds. In addition to those cited we would call the court's attention to the case of *United States vs. Am. Bonding & Trust Co.*, 89 Fed. 925, and the decision of the District Court in the same case reported on page 921 of the same volume.

The facts in this case are very similar to the case at bar; the only difference which amounts to anything is that here the notes were taken for the material furnished and the money paid by the contractor was applied upon an outstanding indebtedness, while in our case the money was applied on the sand and gravel account and the payment for the material which was furnished on this improvement was allowed to run. We desire to call the court's attention especially to this decision and to note its applicability to our case. We think it disposes of the contention of counsel and being a decision of a high federal court is entitled to more than ordinary consideration.

The court here says:

“Indeed, as far as possible in the dealings between the parties it would seem that the materials furnished for the government building were allowed to remain unpaid for and instead thereof notes were accepted in settlement therefor continuing and extending it beyond the period for which the government payments were made upon the building, and indeed, until the contractors had failed.”

So in our case, the materials furnished for the street were allowed to remain unpaid for and instead thereof plaintiff applied the payments which it received for other material which it was selling to the contractors during the time this work was being carried on.

“Plaintiffs in error knew of the existence of the suretyship, they knew that it was upon the faith of the bond executed by the defendant in error that they furnished the material; and they sold the same upon the understanding that they were to be paid for their material as the money was received by the contractors from the government.”

In our case Mr. Hackett testified that with Mr. Hume he came to Vancouver and learned of the bond and that the sureties were responsible, and that, relying upon the faith of the bond, he sold material and that

he had an understanding with Rector that plaintiff was to be paid for the material as the money was received from the city.

“Upon this state of facts, viz., that the contract between the plaintiff in error and Miner & Bro. was not one of credit, but that they were to be paid as the latter received money from the government on account of the work done, and that the money was paid by the government to Minor & Bro., who in turn would be paid to the plaintiffs in error, and they applied the same not to the debt due for material on the building, but for other outstanding debts previously existing between them; it would be manifestly unjust and unfair to allow plaintiffs in error thus to allow the money they had received for the work done on the building, and then require the defendant in error to make good to them a debt that would have been worthless but for the application thereto of money received from the government, which ought to have been applied to the payment of the debt for which the surety was bound.”

Exactly the same situation prevails here. Here the plaintiff received money which came from this improvement and which should have been applied in satisfaction of the debt due for the material, and now to allow them to apply the money to other unsecured claims which

would be worthless but for this application and then to require the sureties to make good to them would be manifestly unjust and unfair.

“This would be the result ordinarily in any case, and particularly so in the present one where the plaintiffs in error owed it to the defendant in error to exercise more than usual diligence to see that they were not innocently mulcted by reason of the suretyship.”

This can be applied with equal force to the case now under consideration.

“Defendant in error was actually led into this particular transaction by the act of the plaintiffs in error and surely no court will hear them contend that the surety executing the bond has not complied with its terms and conditions when they have actually received the money payable under the contract and applied it not in accordance with the terms of the contract, under which they sold their goods to the contractor, but applied it to another and different debt due themselves and which would have been worthless but for the misapplication of the payments thus made to them.”

According to the terms of the contract as testified to by Mr. Hackett the rock was to be paid for when the

contractors received the money from the city; the money was received and paid to the plaintiff but was applied to another and different debt which would be worthless but for the misapplication of the payments made to plaintiff.

“To allow them to apply the money received from the government to a pre-existing debt due them and leave the surety on the government contract in ignorance of the prevailing condition of affairs until after the contractors had failed and made an assignment would work a great hardship, if not result in an actual fraud on defendant in error, and cannot be countenanced, even if *innocently* done.”

What the court here says cannot be countenanced is exactly what plaintiff is contending in this case; it is asking this court to permit it to apply the money received on account of the material which went into this improvement to another debt for which the sureties were not liable and which was not connected with this improvement, and then hold the sureties responsible for the material which went onto this street. The court in the case we have been quoting from says that this cannot be countenanced, even if *innocently* done.

The court further says:

“In dealing with sureties the utmost good faith

must be observed, as in many cases, like the present, they are not able to know the exact conditions of the affairs of the parties for whom they have become surety."

So in our case, if the plaintiff is permitted to use the money which came from this improvement in payment of other debts due it from the contractors the sureties will be rendered liable, and if they had had any intimation of the arrangement which Mr. Hackett claims he had with Rector & Daly and of the course of procedure which they followed, the defendants could have protected themselves.

The above quotations are taken from the decision last cited and we have quoted extensively from this decision because it is directly in point and we think is conclusive of all of the questions involved in this case.

The district judge in passing upon the same question used this language:

"The law of suretyship forbids that there shall be such dealing between the debtor and creditor of which the surety is kept in ignorance as shall put the surety in a situation of peril."

That is exactly what the parties have done in this instance and was the inevitable result of the agreement which Hackett claims he had with Rector.

In support of the decision of the Supreme Court of Washington in *Crane Co. vs. Pacific Heat & Power Co.*, supra, and the case just cited in 89 Fed. 925, we would direct the court's attention to the case of *Bross vs. Mc-Nicholas*, 133 Pac. 783. This is a very recent decision by the Supreme Court of Oregon. The court here refers to the general proposition that a surety cannot direct the application of payments, but notes that this rule is applicable solely in those cases where the principal makes the payment from funds which are his own and free from any equity in favor of the surety to have the money applied in payment of the debt of which the surety is liable, but holds that,

“where the specific money paid, or property delivered, to the creditor is the identical money or property for the payment and delivery of which the debtor and his surety obligated themselves by the contract of undertaking, the surety is not bound by an application of the money or property to some other debt for which the surety is not liable. In such cases the surety is equitably entitled to have the money paid or the property delivered applied to the payment of the debt or the liquidation of the contract for which he is liable,”

citing authorities.

We would also call the court's attention to *Ward vs. Womack*, 168 S. W. 433.

The lower court in passing on this question stated that the authorities were not uniform but that the weight of authority supports the position that we have taken, and we submit that not only is the weight of authority in harmony with our view but that all the equities of the respective parties would clearly justify and warrant a decision in favor of the sureties.

Counsel contend that we must be defeated because we have failed to prove that the plaintiff knew the source of the payments. Our answer to this contention is two-fold, first, we think that the evidence shows conclusively that the plaintiff had notice. We have already quoted sufficient of the abstract to show that the plaintiff knew of the contract which Rector & Daly had with the city, knew that they had given a bond as required by statute, and knew who the bondsmen were, and knew their financial responsibility; plaintiff knew that the payments were intended to be made upon the crushed rock because of the checks which plaintiff received which were marked for crushed rock, and under its agreement with Rector & Daly these payments were to be received on that account when Rector & Daly received their money, so when the checks were received for crushed rock it was evidence that payments were being made by the city for the crushed rock, and in addition to all this the rights of the plaintiff are measured and determined by the contract which Rector & Daly had with the city and all of its

terms and conditions, and plaintiff was bound to take notice that the payments were being received monthly based upon the engineer's estimates.

We think that the court will have no difficulty in reaching a conclusion after an examination of the record of this case, that plaintiff did have notice that payments were being made by the city monthly upon the engineer's estimates and that the contractors were receiving payments on that account and were making payments to plaintiff from money received from that source. This would be sufficient to answer counsels' contention, but we have another answer to counsels' contention and that is that where the sureties have an equity in a particular fund, as they had in this instance, and that particular fund was used to pay the particular liability that they had guaranteed would be paid, then the equities of the sureties control the application whether plaintiff had actual notice that the particular money which it applied had been received directly from the city.

None of the cases which are directly in point upon this question have held that notice is necessary. It is true that in the case of *Crane Co. vs Pac. Heat & Power Co.* it is alleged in the complaint that materialmen had notice, but the decision was not placed upon that ground and the court disposes of the case and announces the rule which we are contending for without any reference to the fact of notice.

In *First National Bank vs. National Surety Co.*, 130 Fed. 401, heretofore cited by us, the court says:

“Neither does the fact that the officials receiving the payment were aware of the source of the money appear to have been regarded as material.”

In the case referred to reported in 89 Fed. 925, heretofore cited by us, no question of notice was considered, but the broad principle of the rights of the sureties in this fund was the controlling factor in the court's decision, but the court in this case expressly held that the materialman would not be permitted to make such an application of payments even though innocently done. The question which the court had in mind was the very thing which counsel are contending for here. Counsel say that unless they had notice of the source of the fund that they were at liberty to apply these payments in any manner that they might see fit, although it would operate as an actual fraud upon the sureties, but the court here says that such conduct cannot be countenanced even though innocently done. This decision meet counsel squarely on this point and is sufficient to dispose of their contention so far as this phase of the case is concerned.

Counsels' argument upon this question applies to general payments, but they overlook the position which the courts have taken with reference to the rights of the sureties under these statutory bonds and do not properly note the exception which should be applied.

The lower court stated in its decision that there was not sufficient in the record to authorize a finding of notice, but there was sufficient to constitute reasonable grounds for belief upon the part of plaintiff that such payments were from that source and was enough to put him upon inquiry as to the source from which they were derived.

Where the sureties' equities in a fund were of such an order as this court and other courts have determined in cases of this kind it is sufficient notice to plaintiff that it had reasonable grounds for belief and was sufficient to put it upon inquiry because if it had reasonable grounds for belief that this money was coming from the city, that the payment which it received was from funds which the contractors had received on account of this improvement, that was sufficient to put it upon inquiry, and knowing of the rights and equities of the sureties it was its duty to pursue that inquiry to prevent fraud upon the sureties and that alone would be sufficient notice when we consider the relative positions and rights of these parties. But here instead of pursuing inquiry of which it had reasonable grounds for belief the plaintiff refused to make any further inquiry or to accept any payments or to take any steps which could possibly put it in possession of information because it was unwilling to receive such information. Its conduct must convince the court that it did not desire such information, for even

though it had received it it was determined that the sand and gravel account should be paid first.

We contend that there is no sufficient evidence in the record to show that plaintiff ever made any application of the payments, and not having made any until after this trial was commenced that it is the duty of the court to make such application according to the rules of justice and equity, and such rules would clearly relieve these sureties under the record in this case.

Although plaintiff was relying upon its books to show its account between it and the contractors and the application which it had made of the payments, it produced no books in court so that an examination of the books might disclose when and in what manner the applications had been made. The testimony of the witnesses as to how the books showed the money had been applied was clearly incompetent because the books were the best evidence.

The statements furnished to the sureties disagreed, no two of them were alike, the bookkeeper admitted that he had made mistakes in the application of the first check which was received; the statements furnished on November 1st showed that the check for \$1000.00 was applied on the crushed rock account, and the \$662.50 on the sand and gravel account, although at the time of the trial and in the bill of particulars furnished defendants

were given credit for \$662.50 on the crushed rock account. In the statement rendered on December 30th, being plaintiff's Exhibit No. 16, plaintiff was asking a balance of \$6693.68, and in the claim which the plaintiff presented to the city on account of the crushed rock furnished on this improvement plaintiff was claiming \$6693.68.

These and a number of other circumstances, together with the entire absence of the books render it extremely doubtful that the plaintiff made any applications of the payments.

The court did not make any findings upon this question, but did state that it was sufficient to render doubtful the question of any such application, and we think that in view of the unsatisfactory condition of the record on this question and in view of the fact that plaintiff did not produce its books and offered no competent evidence upon that subject, that the plaintiff has failed to establish that it made the application of the payments it received from the contractors and that it was for the court to make the application, and the lower court has in effect made it, and its decision was in favor of the sureties.

Counsel contend in their brief that the evidence does not show that the notes which were given by the contractors to the Vancouver Trust & Savings Bank at the time the checks in question were paid, were paid from funds

received from the city. It is not material whether the notes were paid at all, or not. At the time the checks were presented Rector & Daly had no funds in the bank; in order to meet the checks the contractors gave notes to the bank in accordance with their agreement with the bank that the bank would advance money based upon the estimates from this improvement and the notes were given with the distinct understanding and agreement that they were on account of this improvement and it simply constituted an advancement by the bank to the contractors, but the evidence shows that the bank received something over \$22,000.00 from the city in money and bonds which it cashed, on account of this improvement. These notes were given as an advancement against this fund and it is not material what became of the notes so long as they were based upon this fund, made against the fund, and were simply an advancement until the money was received from the city.

In conclusion we desire to call the court's attention to the fact that it has been uniformly held by the Supreme Court of the United States in a long line of decisions that

“The contract of a surety is to be construed strictly and is not to be extended beyond the fair scope of its terms.”

This quotation is taken from the Enc. of U. S. Su-

preme Court Reports, vol. 9, page 718, and a long line of authorities cited in support of the rule.

It is also to be remembered in this case that these were accommodation sureties so far as anything in the record appears. The rights of these defendants are not to be measured by the same rule that the court measures the rights of a surety company that undertakes to guarantee the performance of a contract for hire, but they fall within the rule noted above and are entitled to the consideration which has always been applied to ordinary sureties.

We respectfully submit that the judgment of the district court was in harmony with the weight of authority in cases of this character and that it is in line with what the record will disclose in this case to be right and is but the application of common justice.

Respectfully submitted,

MILLER & WILKINSON,
Attorneys for Defendants in Error.

Vancouver, Washington.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

COLUMBIA DIGGER COMPANY,
a corporation,
Plaintiff in Error,

vs.

M. R. SPARKS and C. A. BLUROCK,
Defendants in Error.

**PETITION OF PLAINTIFF IN ERROR FOR A
REHEARING.**

R. R. GILTNER,
RUSSELL E. SEWALL,
GUY C. H. CORLISS,
Attorneys for Plaintiff in Error and Petitioner.

Filed
DEC 17 1915
F. D. Monckton

Filed this.....day of September, 1915

FRANK D. MONCKTON, Clerk

By.....Deputy Clerk.

No. 2560

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

COLUMBIA DIGGER COMPANY,
a corporation,
Plaintiff in Error,
vs.
M. R. SPARKS and C. A. BLUROCK,
Defendants in Error.

**PETITION OF PLAINTIFF IN ERROR FOR A
REHEARING.**

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals, for the Ninth Circuit.

The plaintiff in error respectfully requests a rehearing in this case upon the following grounds:

It is well settled that in actions at law tried before the court without a jury, the special findings must support the judgment.

See authorities cited at pp. 52-53 of brief of plaintiff in error.

Neither the complaint nor the findings show that plaintiff in error had any knowledge or notice of the source from which the contractors, Rector & Daly, derived the moneys which they paid to plaintiff in error on account of the materials furnished and which were applied by plaintiff in error upon the sand and gravel account.

The decision of the court therefore must be sustained, if at all, on the broad ground that the so-called equity of the surety to have the money derived from the work under the contract applied on account of materials furnished the contractor is absolute and wholly independent of any knowledge or notice on the part of the person making the application of the payment.

We state advisedly that not a single authority has been or can be cited to support this rule. The Washington cases certainly do not support it. In the first case (*Crane Co., v. Pac. Heat & Power Co.*, 36 Washington, 95), the fact of knowledge was conceded by the demurrer to the answer, which alleged knowledge. In *Hughes & Co., v. Flint*, 61 Wash. 460, the decision in 36 Wash. 95, was ex-

plained as having been placed upon the ground of knowledge. This is clearly shown in the dissenting opinion of his Honor, Judge Rudkin.

We now come to the latest decision on the subject in that state. It is the case of Puget Sound State Bank v. Gallucci et al, 144 Pa. 698. The following are the facts so far as the question involved in this case is concerned.

Gallucci had three separate contracts for public improvements in the city of Tacoma. He gave three bonds under the statute in question, signed by himself and a surety. The action was against Gallucci and this surety upon these three bonds. It was brought not by a materialman but by a bank. The bond was so worded that the Supreme Court held that the surety was liable, not only to materialmen **but to those who had furnished the contractor money, provided it** could be shown that the money so furnished the contractor had actually been used in payment for labor and material under the contract. In other words, the bond as construed by the Supreme Court subrogated the plaintiff bank to all of the rights of those who

did work and furnished materials under the contract to the extent that the bank could show that the money so furnished the contractor had actually gone to pay for such work and material.

The trial court found, and its finding in this respect was affirmed by the Supreme Court, that of \$32,000 loaned by the bank to the contractor \$18,425 could be traced as having been used to pay for such work and material. The bank therefore was in the same position with respect to the surety that plaintiff in error in this case was in with respect to the surety in this case, namely, that bank had two claims against the contractor; one for \$18,425, with respect to which it held the surety bonds as security, and the other, to-wit, the balance of its claim for \$32,000, a **general** claim against the contractor Gallucci, **for which it held no security**. It appeared that the trial court in fixing the liability of the surety at \$18,425 found that \$15,787 of this was for money loaned by the bank to Gallucci, which was applied by him in payment for labor and material used in the improvement in **district No. 1101**, to which one of the three

contracts related.

It was urged by the surety that inasmuch as it was held liable for \$15,787 on account of the money which had gone to pay for work and material used in the improvement of district No. 1101, the bank should be compelled to credit on this item all moneys received by the bank on account of work done under the contract relating to district No. 1101.

There was the strongest possible ground for making this claim, because it was undisputed that the plaintiff **bank knew** that the payment of \$10,863.51, which the surety company claimed should be so applied, **came directly to the bank from the city on account of the payment under the contract relating to district No. 1101.**

Here then is a case where the bank standing exactly in the shoes of the plaintiff in error in this case, held two claims against the contractor, for one of which the surety was liable, and for the other of which it was not liable, and the bank with **knowledge** that the money received came from the contract for which the surety was responsible,

deliberately applied the money in payment of the indebtedness against Gallucci for which the surety was not liable, and the Supreme Court of Washington sustained this application and has thereby practically overruled the two prior cases holding that the surety has a right to set aside the application of the payment where the creditor **knows** the source from which the money comes.

Certainly the decision in this Washington case shows that this court is wholly unjustified in saying that the Supreme Court of Washington has laid down the astonishing doctrine that the innocent creditor must have an application of payment made by him without knowledge of any equity, set aside, not because the money did not belong to the debtor, but because a surety has a so-called equity to have the money applied on another debt.

In the case last cited the court said:

“It is contended by counsel for appellant that, in any event, the surety company is entitled to have credited upon its liability under the bonds the sum of \$10,863,51, paid to the

bank upon its indebtedness. We think the answer to this is that when this sum was paid to the bank, upon Gallucci's indebtedness, the bank was not directed by Gallucci to apply it upon any particular portion of the indebtedness. It would seem plain, therefore, that the bank might apply it according to its own pleasure. It was not required to apply it, we think, upon the portion of the indebtedness which it was entitled to make claim for against the bonds. Nor do we think the fact that this money came from the proceeds of district No. 1101 would change the bank's right in this regard. It is practically the same as if the money or proceeds had been paid by the city to Gallucci and then by Gallucci to the bank upon his indebtedness, although it appears that it was paid by the city to the bank upon the order or assignment of Gallucci."

Under the doctrine laid down by this court the innocent creditor who has applied the payment upon the debt for which the surety is not liable, may at a later date, perhaps after the lapse of

several years, find that the application of the payment must be set aside, no matter what the consequence to him may be. This doctrine ignores the fact that the creditor receiving the payment has equities as well as the surety. An application by him made in good faith without knowledge of any equity certainly gives him, in addition to his legal right to stand upon the application made by him, an equity, every bit as strong as that of the surety; especially is this so, when we consider how vital it is that the business world should be allowed to accept money in payment without being compelled to inquire whence the money came.

The creditor on the assumption that he has made a lawful application of payment will in the future shape his whole conduct in a way different from what he would have shaped it if he had applied or been compelled to apply the payment on the other account. This doctrine would demoralize the business world in cases of this kind. No creditor could tell whether an honest application of a payment made by him would stand, or whether it would be set aside in the future. This rule casts upon the

creditor the unheard of duty of interrogating the contractor to find out whence came the money with which the payment is made. Such an inquiry is rightly characterized by his Honor, Judge Rudkin, as an **"impertinence at the best."** But the doctrine laid down in this case goes further and holds that the innocence of the creditor is immaterial, and that therefore it may be useless for him to make this impertinent inquiry of the contractor, for the reason that if the contractor should make a false statement as to the source of the money, he (the creditor) would be no better off than if he had not made the inquiry because of the alleged **absolute right** of the surety to have the money applied in extinction of his liability, if it came from the particular contract for which he is surety. This rule is very properly called by his Honor, Judge Rudkin, in his opinion an **inexorable rule of law.**

Let us proceed a step further. If the surety has an absolute right to have all payments which came from the contract applied in discharge of his liability upon the debt for materials furnished under

the contract, then the following result would be inevitable. If the surety, in ignorance of the fact that certain payments made by the contractor had been made by money derived from the contract, should pay under his supposed liability on the bond, a claim for materials furnished the contractor, he (the surety) could subsequently, on discovering the mistake, sue the materialman to recover back the money as money paid under a mistake of fact.

Suppose such materialman had two claims of \$10,000.00 each against the contractor. One is for material furnished under the contract, the other is for material furnished the contractor for some other purpose. The contractor makes a payment of \$10,000.00 and it is applied by the materialman upon the claim for which the surety is not liable in ignorance of the source from which the money came. The surety, also ignorant of the source from which the money came and believing he is liable on his bond, voluntarily pays the claim of the materialman for \$10,000.00. Subsequently the surety discovers that the money with which the contractor made the payment of \$10,000.00 was

derived from the contract for which the surety was liable. Under the rule laid down in this case, the surety can recover this \$10,000.00 as money paid under a mistake of fact, because in the supposed case the surety would not be liable for a dollar.

The court in its opinion wholly ignored the rule of law set forth at pp. 29 to 35, both inclusive, of the brief of plaintiff in error. These rules of law are that if any party receives **money**, or what is in law the equivalent of money—a check or draft—in payment of an **antecedent debt**, but honestly believing the money to belong to his debtor, he cannot be compelled to refund the money to the true owner, although such owner can show that the money with which such payment was made was money stolen from him by the debtor, and can trace the money directly through the hands of the debtor into the pocket of the creditor.

In other words, the defendants in error could not recover from plaintiff in error the amount of these payments, even though they could show that the very money used in making these payments was

stolen from them by the contractors and paid to plaintiff in error. But this court by the doctrine laid down by it has permitted defendants in error in effect to recover the amount of these payments by setting aside a lawful application of such payments made by plaintiff in error to an antecedent debt owing it by the contractors, and giving the sureties the benefit of these payments. This is taking the money from the pocket of plaintiff in error and putting it in the pocket of the sureties after the plaintiff in error has in good faith, lawfully used this money to pay a debt owing it.

This court has therefore held that defendants in error who have a **mere equity** in this money at the most, have greater rights in following it in the hands of an innocent creditor than if they originally held the **full title** to the money and could trace it directly into the pocket of the plaintiff in error.

This rule is so extraordinary and so squarely in the teeth of the elementary rules relating to the free exchange of money as to fully justify the language of his Honor, Judge Rudkin in his dis-

senting opinion when he says:

"It (the majority opinion) places restraints on the free use and exchange of money which have not heretofore received judicial sanction. In that respect it stands unsupported and alone."

The decision is squarely against another line of decisions. This court is familiar with the trust fund doctrine. A party may in equity follow his property or money so long as he can trace it, although its form has been changed. But all the decisions agree that this doctrine has no application to the case of **money** which has been received by the third person in payment of an **antecedent debt**, unless he **knew** of the equitable rights of the owner.

See authorities cited at pp. 37-38 of brief of plaintiff in error.

Applying that doctrine to this case the following conclusion would result. If the moneys with which the payments were made to plaintiff in error were in equity the moneys of defendants in error (the sureties), they (the sureties) could not follow these

moneys into the hands of the plaintiff in error, without showing that plaintiff in error **knew**, at the time the moneys were applied by it on its claim against the contractors that the moneys were in equity the moneys of the sureties. But the sureties in this case had neither legal nor equitable title to these moneys. These moneys did not belong to them in equity or at all. At the very most they had a so-called equity in the application of these moneys to the crushed rock account instead of to the sand and gravel account. And yet the decision of this court is that these sureties, although possessing a mere equity of this kind, are in a **stronger** position than they would be if the moneys paid to plaintiff in error were in equity their moneys. They do not have to show any knowledge on the part of plaintiff in error.

The decision in this case runs counter also to another settled rule of law, which holds that notice is necessary. That rule is this: If a public officer with two different sets of sureties upon his official bonds for two successive terms uses money received during the second term to pay obligations arising

against him during the first term, the sureties on his second bond cannot complain of this application of payment unless the public authorities to whom the payment is made **know** that the moneys so applied were collected during the second term. This matter is fully discussed, and the authorities on this point are cited at pp. 23-27 of brief of plaintiff in error.

The distinction is there pointed out between cases of the kind referred to and those cases in which the public officer is a mere **custodian** of the money. Of course when this is the case **the relation of debtor and creditor does not exist** between such public officers and the public, and therefore when such public officer as mere custodian of the money collected during the second term and belonging to the public, pays over this money to the public, no application of this money by the public on account of collections made during the first term can be made, for the simple reason that the public officer in that case is not making, and the public is not receiving, **any payment**, but

on the contrary, the public officer is actually **accounting** for the money received during the second term and in his hands as mere custodian. It is obvious that in such case the knowledge of the public as to the source from which the money came is wholly immaterial. This distinction is clearly pointed out in the discussion of this question at pp. 23-27 of brief of plaintiff in error.

If these sureties have an absolute equity as against plaintiff in error to have the moneys derived from the contract applied in payment of the bills for materials furnished thereunder, then the logic of this doctrine is that plaintiff in error could have no right to apply these moneys on the sand and gravel account, even though it had no account against the contractors for materials furnished for the contract. Such a conclusion is absurd. We contend that plaintiff in error would have the right to so apply the money in such a case, even though it knew that the money had come from this contract. The money in such a case would be the money of the contractors, and

plaintiff in error would be under no obligation to assume that the contractors were insolvent, or if even insolvent, that the effect of the transaction would operate as a fraud upon the sureties. Let the sureties protect themselves by taking security received under the contract that they may be sure from the contractors, or by so controlling the funds that they are so applied as to relieve them from liability. It is not for the courts to help them by placing intolerable limitations upon the free circulation of money.

We now desire to call the court's attention to the remarkable findings of fact upon which the judgment is based. The findings necessary to sustain the judgment are these (even if we should assume that knowledge was not essential) to-wit: that Rector & Daly used moneys received by them under this contract in making payments to plaintiff in error, that such payments were in excess of the amount due for crushed rock, and that plaintiff in error applied such payments on the sand and gravel account. All the facts relating to these matters which are at all found by the

court are found in the 10th and 11th findings, and the court will search these findings in vain for any clear statement of these essential facts, pp. 25-27, Trans.

The 10th finding finds the following facts:

That an arrangement was entered into between the Vancouver bank and the contractors, under which the moneys to be derived from the contract were assigned to such bank; that in consideration thereof the bank advanced money to the contractors from time to time for carrying on the contract and for payment of labor and materials. That the money received by the bank from the contract was paid out by it to Rector & Daly and their creditors and was a sum in excess of the bill of plaintiff in error for the crushed rock. In this finding there is not the slightest hint that a dollar of this money was ever paid **to the plaintiff in error** by the contractors or by anyone else. The finding merely is that the bank paid out to the **contractors and their creditors** a sum in excess of the amount due plaintiff in error for crushed rock.

The 11th finding of facts contains the following

elements: That the bank paid to the plaintiff in error a sum in excess of the amount due it for the crushed rock, and that the money so paid to plaintiff in error was money paid by said bank **against** estimates for the improvement as the work progressed.

But we are not interested in the payments made by the **bank**, or in the question as to the claims **against** which such payments were made. What we are interested in finding out is whether the **contractors** themselves made such payments and whether in making them they used **the money received from this contract**. The finding then proceeds to state that the money paid plaintiff in error through said bank was realized from the work and improvement under the contract for which defendants in error were sureties.

But this is a mere conclusion, for the facts which determine whether such moneys were realized from such contract are specifically stated in these findings, and they show that the money was not so realized. And then this finding further

asserts that these moneys were the **same moneys** “for the collection and payment of which the sureties were obligated.” This last finding is senseless, because the sureties were not obligated for the collection and payment of any moneys under the contract. They did not agree that the contractors would use moneys received from the contract in paying for the materials used in the performance thereof. Their obligation is an **absolute** obligation as sureties that the contractors would pay for all materials used under the contract, whether such contractors did or did not use in making such payments the moneys received by them under the contract.

We assert that these two findings will be searched in vain for any clear and coherent statement of the facts necessary to sustain the judgment on the theory on which it is sought to be sustained. They show on their face merely this state of facts: That the contractors assigned the moneys due under the contract to the bank as collateral for moneys to be advanced; that such moneys were advanced

from time to time, and that the bank and not the contractors made the payments to the plaintiff in error. This latter version of the transaction is wholly unsustained by the evidence. As a matter of fact, the bank never paid plaintiff in error a dollar. The sole connection of the bank with these transactions was that it took an assignment of the moneys due under the contract as collateral and loaned the contractors money from time to time, on their notes, and gave them credit for such notes in their general checking account, and that the payments that were made, were made by the contractors with their checks drawn upon their own moneys so on deposit with the bank.

Plaintiff in error challenged in the court below the 11th finding of fact, which contains everything that can possibly be urged to support the judgment. pp. 199-204, Trans.

Plaintiff in error also by specific requests, asked the court to find specifically certain facts regarding these payments which all rest on undisputed evidence. Trans., pp. 184-197.

The court in its opinion has wholly ignored the contention of plaintiff in error regarding the real facts of the case and has accepted the findings as final. That plaintiff in error is in position to urge the point that the evidence does not sustain the findings, and that the findings requested should have been made; see pp. 54-55 of brief of plaintiff of error.

It is impossible to discuss the facts anew in this petition. This has been done at pp. 43-50 of brief of plaintiff in error. However, we call the court's attention to the following salient points as established conclusively by the evidence.

Not a dollar of the money received by the contractors from the city ever reached the pocket of plaintiff in error. The city paid the contractors under the contract up to the time they abandoned it, only two payments. One was a cash payment by a draft of \$10,046.17. The other was by the issue of bonds aggregating \$11,500.00. There is not a shred of evidence tracing any of this money or the proceeds of these bonds into the pocket of

plaintiff in error. The money from the draft was drawn out the very day it was deposited. All these moneys were deposited in the general checking account of the contractors. Funds from all sorts of sources were deposited in this account, and checks to pay all kinds of bills were drawn upon it. So far as the record shows, every dollar of the money received from the draft has gone to pay other claims. The bonds were sold and the proceeds used to pay **some** of the notes of the contractors, but there **were sixteen** of such notes, aggregating over \$25,000.00, and the only notes that have any bearing in tracing the moneys are **six** notes; p. 45 of brief of plaintiff in error. How do we know that a dollar of the proceeds of these bonds ever went to pay any of these six notes.

What happened was this: The contractors from time to time discounted their notes at the bank and got credit for the proceeds. These proceeds went into their general checking account. From time to time they made payments to plaintiff in error by checks. The only possible excuse for saying that the money has been traced is that the

contractors had assigned the contract to the bank as security. This is all that the cashier claims in his evidence. He says: "**The security of these notes I have testified about was the assignment that was put on record in the clerk's office and that is the only way I know.**" Trans., p. 119. In determining whether money received by plaintiff in error upon one of these checks was money derived by the contractors from the city under the contract, it is only necessary to make this practical test. Suppose after raising a particular amount of money by a particular note, the proceeds of that note being at once checked out and traced to the pocket of plaintiff in error, the contractors had, when the note fell due, paid it by money received from **another source**, would it be seriously urged that the moneys used in making this payment had been derived from the contract merely because the contract had been put up as collateral security? The attempt to trace this money falls down at a number of points.

As to the draft for \$10,046.17 it appears that this was more than checked out at the very day

it was deposited. Trans., pp. 157-158.

With respect to the \$11,500.00 bonds, it appears that they were sold after the loans had been made to the contractors by the bank, so that not a dollar of this money is represented by the credits given to the contractors by the bank and discounting these notes. And to cap the climax, there is no such clear evidence as the courts require in cases of this kind to show that any of the proceeds of these bonds were subsequently used to pay the notes which created the credits which it is claimed were checked against in making the payments to plaintiff in error. And what makes the contention in this behalf more untenable is the fact that the evidence to show that the checks with which these payments were made were paid out of the proceeds of certain notes, is when carefully analyzed found to be without any value in establishing this point. See pp. 46-49 of brief of plaintiff in error.

Counsel for plaintiff in error have expended a large amount of time and money in laying the foundation for the review in this court of the findings of the trial court. They not only objected to

and challenged the findings of the trial court so far as they relate to these questions, but they also requested the court to make many findings of fact relating to these payments, and they contend that all of these requests were fully justified by the evidence. We therefore respectfully insist that we have the right to have the evidence reviewed and not have the case disposed of on findings which do not represent the true facts at all.

In conclusion, we call the court's attention to the fact that the opinion wholly ignores the question of knowledge or notice. The court does not decide whether it is necessary or unnecessary, although the inevitable consequence of the decision is that knowledge is wholly immaterial.

We again direct the court's attention to the fact that the very foundation of defendants' defense is that the plaintiff in error had in fact applied these payments on the sand and gravel account, and that this application should be set aside and the moneys applied in exoneration of the sureties. The case is not a case in which the court is called upon to make application of payments which have

not been made by the parties themselves. It is a case in which a court of law is asked to set aside an application of payments honestly and innocently made, upon the ground of a mere equity without any appeal to a court of equity for such purpose.

Respectfully submitted.

R. R. GILTNER,
RUSSELL E. SEWALL,
GUY C. H. CORLISS,

Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing prepared by me is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

GUY C. H. CORLISS,

Of Counsel for Plaintiff in Error and Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CLERE CLOTHING COMPANY, a Corporation,
Appellant,
vs.

THE UNION TRUST & SAVINGS BANK, a Corporation, Trustee
in Bankruptcy of the Estate of PRAGER-SCHLESINGER
COMPANY, a Corporation, Bankrupt,
Appellee.

In the Matter of the Estate of PRAGER-SCHLESINGER COM-
PANY, a Corporation, Bankrupt.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern
District of Washington, Northern Division.

Filed

FEB 6 - 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CLERE CLOTHING COMPANY, a Corporation,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

BELDEN & LOSEY, Old National Bank Building,
Spokane, Washington.

Attorneys for Clere Clothing Company,
Claimant.

WAKEFIELD & WITHERSPOON, Peyton Build-
ing, Spokane, Washington.

Attorneys for Union Trust & Savings Bank,
Trustee for Prager-Schlesinger Com-
pany. [2*]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 1742—IN BANKRUPTCY.

In the Matter of PRAGER-SCHLESINGER COM-
PANY,

Bankrupt.

Order of Adjudication.

At Spokane, in said district, on the 8th day of Au-
gust, A. D. 1913, before the Honorable FRANK H.
RUDKIN, Judge of said Court in Bankruptcy, the
petition of Clere Clothing Company et al., that
Prager-Schlesinger Company be adjudged a bank-
rupt, within the true intent and meaning of the Acts
of Congress relating to bankruptcy, having been
heard and duly considered, the said Prager-Schle-
singer Company is hereby declared and adjudged
bankrupt accordingly.

*Page-number appearing at foot of page of original certified Record.

WITNESS the Honorable FRANK H. RUDKIN, Judge of said Court, and the seal thereof, at Spokane, in said district, on the 8th day of August, A. D. 1913.

(Signed) W. H. HARE,
Clerk.

Enter:

(Signed) FRANK H. RUDKIN,
Judge.

[Seal of Court.]

[Endorsements]: Order of Adjudication. Filed August 8, 1913. W. H. Hare, Clerk. By S. M. Russell, Deputy. [3]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1742—IN BANKRUPTCY.

In the Matter of PRAGER-SCHLESINGER COMPANY, a Corporation,

Bankrupt.

Objection to Claim of Clere Clothing Company.

Comes now the Union Trust & Savings Bank, trustee of the above-named bankrupt's estate, and moves the Court for the reconsideration and rejection of the claims of the Clere Clothing Company heretofore filed with the referee in bankruptcy on the 25th day of August, A. D. 1913, and allowed by the referee in bankruptcy on the 25th day of August, A. D. 1913, said claims being for the amount of

thirty thousand six hundred forty dollars (\$30,640), and interest from May 21, 1913, also for the amount of sixteen hundred ten and 67/100 dollars (\$1610.67).

This objection and petition for rejection is made upon information and belief and your trustee is informed and is of the belief that the said claims are without consideration and in equity should be rejected in whole.

And for the further reason that your trustee is informed and is of the belief that while said business was conducted as Prager-Schlesinger Company, the ownership, management and control thereof rested in the Clere Clothing Company, said claimant, and that the entire capital stock of the Prager-Schlesinger Company was owned, held and controlled by the said Clere Clothing Company, and that while the business was operated under the name of Prager-Schlesinger Company and Prager, it was owned, operated and controlled by the Clere Clothing Company, and that the said Clere Clothing Company is liable for the debts of the Prager-Schlesinger Company while so operated and controlled, and is not entitled to participate [4] as a creditor in the assets of the said Prager-Schlesinger Company.

WHEREFORE, your petitioner prays that the Court fix a day for hearing of this petition, and that notice be given to the claimants and that upon said hearing the claim of the Clere Clothing Company

filed as above be rejected and disallowed.

(Signed) UNION TRUST & SAVINGS BANK,
By JAS. C. CUNNINGHAM, as its Vice-President.

Trustee in Bankruptcy.

(Signed) WAKEFIELD & WITHERSPOON,
Attorneys for Trustee in Bankruptcy.

[Endorsements]: Received copy this 3d day of December, 1913. (Signed) Belden & Losey, Attorneys for Clere Clothing Company. Objections to Claim of Clere Clothing Company. Filed December 3, 1913, at 5 o'clock P. M. Sidney H. Wentworth, Referee. [5]

[Certificate of Referee in Bankruptcy.]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 1742—IN BANKRUPTCY.

In the Matter of PRAGER-SCHLESINGER COM-
PANY, a Corporation,

Bankrupt.

To the Honorable FRANK H. RUDKIN, District
Judge:

I, Sidney H. Wentworth, the Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding an order, a copy of which is annexed hereto, was made and entered on the 8th day of September, 1914.

That on the 9th day of September, 1914, Clere

Clothing Company, a creditor in such proceedings, feeling aggrieved thereat, filed a petition for a review, which was granted.

That a summary of the evidence on which said order was based is included in the opinion annexed hereto.

That the question presented on this review is whether two claims proved against the estate of the bankrupt by the Clere Clothing Company should have been rejected.

I hand up herewith for the information of the Judge the following papers:

(1.) The two claims of the creditor above mentioned.

(2.) The petition on which this certificate is granted.

(3.) The trustee's petition for the reconsideration and rejection of said claims.

(4.) The transcript of the testimony adduced at the hearing, marked Schedules A, B, C, D, and E.

(5.) The Exhibits introduced in evidence, marked Trustee's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26; and Creditor's Exhibits 27, 28, 29, 30, A, B, C and D. [6]

Dated September 9, 1914.

Respectfully submitted,

(Signed) SIDNEY H. WENTWORTH,

Referee in Bankruptcy. [7]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 1742—IN BANKRUPTCY.

In the Matter of PRAGER-SCHLESINGER COM-
PANY, a Corporation,

Bankrupt.

**Order Disallowing and Expunging Claims of Clere
Clothing Company.**

At Spokane, in said district, on the 8th day of Sep-
tember, A. D. 1914.

The Clere Clothing Company having heretofore and on August 25th, A. D. 1913, filed two claims against the above-named bankrupt for \$30,640.00 and interest, and \$1610.67, respectively, and said claims having been on said 25th day of August, A. D. 1913, allowed by the referee in bankruptcy, and the Union Trust & Savings Bank, trustee of the above-named bankrupt's estate, having thereafter and on the 3d day of December, A. D. 1913, filed its petition for the reconsideration and disallowance and expunging of said claims and this matter upon the issue so formed having duly come on for hearing before the undersigned, referee in bankruptcy, on March 20th, 1914, at 10:00 o'clock A. M., the trustee appearing by its attorneys, Messrs. Wakefield and Witherspoon, and said Clere Clothing Company appearing by its attorneys, Messrs. Belden & Losey and H. R. Newton, and the testimony of witnesses having been taken on behalf of said trustee and on

behalf of said claimant; and said matter having been submitted on briefs; and it appearing to the referee in bankruptcy: First, that said claims of said Clere Clothing Company are without consideration; Second, that the Clere Clothing Company and the Prager-Schlesinger Company are one and the same, the latter being merely an adjunct or instrumentality of the former, and that claimant's claims would amount to permitting it to prove debts against itself in fraud of creditors; that the Clere Clothing Company simply conducted [8] a branch office of its business in Spokane, under the name of Prager-Schlesinger Company and endeavored to work the machinery of the Prager-Schlesinger Company, a corporation, in such a manner that if the business failed the creditors and not the Clere Clothing Company would be the principal loser;

IT IS ORDERED that both of said claims of the said Clere Clothing Company above referred to, filed August 25th, A. D. 1913, for \$30,640.00 and interest, and \$1610.67, respectively, be and the same are disallowed in full and expunged from the list of claims upon the trustee's record in said action.

(Signed) SIDNEY H. WENTWORTH,

Referee in Bankruptcy. [9]

[Opinion of Referee in Bankruptcy.]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1742—IN BANKRUPTCY.

In the Matter of PRAGER-SCHLESINGER COMPANY, a Corporation,

Bankrupt.

WAKEFIELD & WITHERSPOON, for Trustee.
BELDEN & LOSEY, for Claimant.

On August 8, 1913, the Prager-Schlesinger Company, a corporation, was adjudged bankrupt upon a petition filed by Clere Clothing Company, Creditors' Claim & Adjustment Company, and A. A. Siegfried. August 25, 1913, the Clere Clothing Company filed two claims against the estate, one for \$30640.00 and interest, founded upon a promissory note alleged to have been given claimant by the bankrupt in payment for a stock of merchandise and fixtures sold the bankrupt by the claimant on January 25, 1913, and one for \$1610.67, alleged to be the purchase price of merchandise sold to claimant subsequent to January 25, 1913.

The trustee has filed a petition for the reconsideration and rejection of both of said claims, upon two grounds, viz.:

1. That the claims are without consideration and in equity should be rejected in whole.

2. That while the bankrupt's business was conducted under the name of Prager-Schlesinger Com-

pany, the ownership, management and control thereof rested in the Clere Clothing Company, the claimant, and that the entire capital stock of the Prager-Schlesinger Company was owned, held and controlled by the Clere Clothing Company, and that the Clere Clothing Company is liable for the debts of the Prager-Schlesinger Company while so operated and controlled, and is not entitled to participate as a creditor in the assets of the [10] Prager-Schlesinger Company.

The evidence shows that in April, 1912, prior to the bankruptcy proceeding now pending, the Prager-Schlesinger Company was adjudged bankrupt upon a voluntary petition. The bankrupt offered a composition of 25%, which was accepted by the creditors and confirmed by the Court. Under this composition \$21474.83 was turned over to the trustee in bankruptcy and distributed in paying the expenses of administration, priority claims, and 25% on the claims of general creditors, and all of the bankrupt's assets were delivered to the bankrupt. The money to carry out the composition was advanced by the claimant, Clere Clothing Company, then one of the Prager-Schlesinger Company's largest creditors, and the bankrupt's assets were turned over to the Clere Clothing Company. The claimant has introduced in evidence a copy of a bill of sale, marked "Creditor's Exhibit 30," which purports to sell all of the bankrupt's assets to the Clere Clothing Company "for value received from Clere Clothing Company, of Syracuse, New York, a corporation, the receipt of which value is hereby acknowledged, and in con-

sideration that the said Clere Clothing Company shall advance and pay to the Court such sums of money as are necessary to effect a composition of the undersigned, Prager-Schlesinger Company, with its creditors at a basis of twenty-five cents on the dollar, and to pay such expenses as are fixed by the Court and are necessarily incurred by said Prager-Schlesinger Company, a corporation, through its duly authorized officers.....". Thomas H. Clere, President of the Clere Clothing Company, testified (P. 22 of deposition) that the Clere Clothing Company advanced to the Prager-Schlesinger Company \$26247.00 to effect the composition. At least \$26000.00 of this amount was borrowed by the Clere Clothing Company of the National Bank of Commerce of Spokane, the Clere Clothing Company giving the bank its three notes aggregating \$26000.-00. The loan was [11] negotiated with Dana Child, then Vice-president of the bank, by Thomas K. Smith, Secretary of the Clere Clothing Company, who said that his company had bought or was going to buy the stock of the Prager-Schlesinger Company and was going on doing business, and that the Clere Clothing Company would open an account with the bank. On May 21, 1912, the bank issued a cashier's check to the Clere Clothing Company for \$4272.21 (Trustee's Exhibit 1). This check was paid through the clearing house June 8, 1912, and seems to have been received by the Exchange National Bank. On May 31, 1912, the National Bank of Commerce issued two more cashier's checks to the Clere Clothing Company for \$500.00 and \$21474.83, respectively,

(marked Trustee's Exhibits 2 and 3). The first was indorsed to the Spokane Realty Company and the second was indorsed to the Court and distributed under the composition as mentioned above. The indorsements on Exhibits 2 and 3 show that they were paid through the clearing house June 5th and June 3rd, respectively. There seems no doubt that these three cashier's checks represent the amount that Clere testified was advanced to the Prager-Schlesinger Company to effect the composition. To what use the \$500.00 check to the Spokane Realty Company was put does not appear, but light is thrown upon the check for \$4272.21 received by the Exchange National Bank, by the testimony of Harry L. Cohn, a member of the law firm representing the Prager-Schlesinger Company in the former bankruptcy proceedings, and Edwin T. Coman, president of the bank. Mr. Cohn testified "Mr. Smith (Thomas K. Smith) told me that Mr. Coman told him unless a greater amount was paid to the bank than was paid to the others he would refuse to accept it (the composition), and would prosecute Mr. L. Prager criminally; and for that reason the bank forced them to pay them, as I recall, 50% more than any other creditors." Mr. Coman testified that the bank received \$4272.20 in the bankruptcy proceedings and that by a deal made with Thomas K. Smith it received \$4272.21 for the sale of its collaterals and claim [12] against the Prager-Schlesinger Company. These collaterals were described by Mr. Coman as the personal guaranty of Prager and Schlesinger and several others, and the guaranty of the

Prager Company, which controlled certain mining interests in the Coeur d'Alenes. The bank also turned over a financial statement of the Prager-Schlesinger Company which they were anxious to get.

The estimated value of the assets received from the bankrupt by the Clere Clothing Company was, according to the testimony of Thomas H. Clere, its president, \$30,000.00. Immediately upon receipt of these assets the Clere Clothing Company turned them over to H. L. Gilmore & Company on consignment to sell. The property was insured in the name of Clere Clothing Company. Gilmore & Company remained in charge until the latter part of July, 1912. During this period the Clere Clothing Company added to the stock merchandise invoiced at \$21257.90 (See Exhibit "A") and H. L. Gilmore purchased a little merchandise from Spokane merchants to fill out, amounting to a few hundred dollars. While H. L. Gilmore & Company was in charge a bank account was opened with the National Bank of Commerce under the name of Clere Clothing Company. From the bank's June statement (Trustee's Exhibit 6) it appears that the account was opened on June 10, 1912. While Gilmore & Company was in charge the proceeds of the sale were deposited in this account, and the account was debited by the bank \$10360.12, for which sum the Clere Clothing Company was given credit on its note for money borrowed. (See Trustee's Exhibits 6 and 7.) No checks were drawn on the account during this period.

Very shortly after the confirmation of the com-

position several checks made payable therein to creditors, were, according to the testimony of T. T. Grant, their attorney, turned over either to Smith or to Belden. (Exhibits 9 to 15, inclusive.)

The names of the creditors whose checks went to Smith and [13] the amounts of their respective checks are:

James J. Murphy.....	\$ 89.21
Clara Prager....	1895.76
Sidney S. Prager.....	31.87
Geo. K. McDowell.....	63.90
Abraham Crystal....	136.80
Cohn & Rosenhaupt....	258.60
<hr/>	
\$2476.14.	

The check of Bertram M. Ball for \$810.38 was delivered to Belden. The arrangement under which such a disposition of these checks was made does not appear.

The very last of July, 1912, according to the testimony of Thomas H. Clere and Leon Levy, who did business under the name of H. L. Gilmore & Company, Gilmore & Company, under instruction from Clere, turned over all the property left in Spokane to the Prager-Schlesinger Company to act as selling agents for the Clere Clothing Company. Clere testified that the Prager-Schlesinger Company was not authorized to buy goods on account by the Clere Clothing Company or to carry on business for it. In July, 1912, according to the testimony of Henry R. Newton, who was then, and now is, associated with the firm of Belden & Losey, attorneys for the Clere

Clothing Company, Clere came to Spokane and arrangements were made for consigning the stock of merchandise to the Prager-Schlesinger Company. By these arrangements, Newton testified, the merchandise so consigned and all of the capital stock of the Prager-Schlesinger Company, a corporation, 500 shares, with the exception of one share held by L. A. Schlesinger, was turned over to Clere & Newton, Clere holding 498 shares and Newton one. This transfer, Newton, Belden and Clere testified, was made in trust for the former stockholders, and its purpose, according to Newton and Clere, was to protect the Clere Clothing Company if L. A. Schlesinger should act [14] dishonestly. The agreement was not in writing.

On July 29, 1912, the National Bank of Commerce received a signature card authorizing L. A. Schlesinger to sign checks on the Clere Clothing Company account. (Trustee's Exhibit 5.) The trustee introduced in evidence another signature card (Trustee's Exhibit 4) authorizing the payment of checks on the Clere Clothing Company account when signed Prager-Schlesinger Company, By L. A. Schlesinger. The latter card bears no date. There is no positive testimony fixing the time the second card was given to the bank or by whom either of them was given, but Child thought that both were given the bank by L. A. Schlesinger about July 29, 1912. (P. 32.) From July 31, 1912, until August 12, 1912, a few checks aggregating in amount about \$1,300.00, and signed Clere Clothing Company, By L. A. Schlesinger, were drawn on the account. Thereafter all

checks were signed Prager-Schlesinger Company, by L. A. Schlesinger.

After the agreement made the end of July, according to claimant's evidence, no further change in the relation of the Clere Clothing Company and the Prager-Schlesinger Company took place until January 25, 1913. Between these dates Clere testified that the Clere Clothing Company consigned to the Prager-Schlesinger Company additional merchandise to the value of \$6,024.95. (See Exhibit B.) The next period in the history of the Prager-Schlesinger Company begins with January 25, 1913, and ends with the commencement of the present bankruptcy proceedings. Clere testified that he was in Spokane about January 25, 1913, when L. A. Schlesinger advised him that the Prager-Schlesinger Company wished to buy all of the stock of merchandise, furniture, fixtures and accounts belonging to the Clere Clothing Company which was in the hands of the Prager-Schlesinger Company, consigned to it, for sale. That he told Schlesinger to have an inventory taken, which was done, the inventory showing said property of the Clere Clothing Company to be worth \$30,640.00. This inventory was not produced, but Newton testified [15] that he thought between \$26,000.00 and \$28,000.00 of this sum was merchandise and the balance fixtures, or fixtures and accounts receivable. Belden testified that his recollection was that the merchandise inventoried about \$26,000 or \$27,000, and that the balance was bills receivable, and fixtures. A special meeting of the trustees of the Prager-Schlesinger Company was

held January 25, 1913, at 7:30 P. M., in Belden & Losey's office. T. H. Clere, L. A. Schlesinger and H. R. Newton, all of the trustees being present. Clere offered to sell the said property of the Clere Clothing Company in Spokane to the Prager-Schlesinger Company for \$30,640.00, and to accept the vendee's demand note. This offer was accepted by the unanimous vote of the trustees. At 7:40 P. M. a meeting of the stockholders of the Prager-Schlesinger Company was held at the same place, all of the stockholders, Clere, Schlesinger and Newton, being present, and by unanimous vote this action of the board of trustees was ratified. (See Creditor's Exhibit 29.) No papers or agreements passed between the Prager-Schlesinger Company and the Clere Clothing Company, because of this transaction, except the promissory note for \$30,640.00 upon which one of claimant's claims is based. At a special meeting of the board of directors of the Clere Clothing Company held in Syracuse, New York, on March 4, 1913, the sale was approved. (See Exhibit "C.") Clere testified that subsequent to this sale his company sold outright to the bankrupt merchandise of the value of \$1,610.67 (Exhibit "D") and that nothing has been paid on this account or the note above mentioned. The capital stock of the Prager-Schlesinger Company continued to remain in the hands of Clere, Newton and Schlesinger. At a special meeting of the board of trustees of the Prager-Schlesinger Company held on July 8, 1913, pursuant to notice issued at the request of T. H. Clere, and attended by Clere and Newton, a resolution was passed that the cor-

poration admit its insolvency and willingness to be adjudged a [16] bankrupt. On July 15, 1913, a special meeting of the board of trustees was held, attended by Clere, Newton and Schlesinger, at which the secretary was authorized to consent to the appointment of a receiver. The same persons then met as stockholders and ratified the action of the board of trustees on July 8th and July 15th. (Trustee's Exhibit 16.)

The trustee has introduced in evidence a letter from Thomas K. Smith to L. A. Schlesinger, dated June 27, 1913 (Trustee's Exhibit 19), complaining that Schlesinger had not paid that month's interest on the Clere Clothing Company's loan at the National Bank of Commerce and complaining of poor business during "Pow Wow" week.

Trustee's Exhibit 1 is a note of the Prager-Schlesinger Company for \$500.00, dated March 10, 1913, and made payable to the Clere Clothing Company, together with a letter from Clere to Schlesinger inclosing the above-described note and advising him that some notes Clere had written for on June 14th had not yet been received. Clere testified that this was one of a series of accommodation notes in denominations of \$500.00 given to the Clere Clothing Company by the Prager-Schlesinger Company; that his Company had had as high as \$3,000.00 in such notes; that they had all been paid by the Clere Clothing Company when they became due, and that no charge was made against the Prager-Schlesinger Company.

From the testimony of Josiah Richards, an expert

accountant who examined the bankrupt's books, it appears that entries commenced in the books on June 3, 1912. The books were opened by capitalizing the merchandise at \$40,000.00, the fixtures at \$5,000.00, and the accounts receivable, the old accounts of the Prager-Schlesinger Company, at \$10,011.31. No money was afterwards put in the business outside of money received from the sale of merchandise, except an item of July 10, 1912, of \$810.08, described as the Ball check, two items of \$101.00 and \$48.75, respectively, on June 4, 1912. There [17] are several accounts relating to the Clere Clothing Company, viz.: an account entitled Clere Clothing Company, the first entry of which is June 3, 1912, and the last July 22, 1912; an account entitled Clere Clothing Company consignment, the first entry of which is June 5, 1912, and the last July 22, 1912; an account, the first entry of which is August 15, 1912, and the last January 3, 1913, and another running from February 4, 1913, to June 10, 1913. From the numbering, it appears that the first, third and fourth of these are one account. The ledger and day-book show no note or bills payable to the Clere Clothing Company for \$30,640.00. Asked if from his examination of the books he could say that there was any change in the management at all, or any change in the ownership of the business from the first week in August, 1912, up to July, 1913, Richards testified (P. 138): "The books indicate that there was no change during the period from June 1st to the last entry in the books in July, 1913; that is, from June 1, 1912, the accounts continue dur-

ing the entire time. There are no closing entries. There was no inventory taken; there is no record of any bills payable in the books that would indicate a sale. Every account continues during this period without having been closed." From June 3, 1912, to August 1, 1912, a Mr. Gilmore received a percentage on all goods sold. From August 1, 1912, to the last entry in the books, the latter part of July, 1913, Gilmore receives no more payments on account of goods sold, nor does his name appear in the expense account, but salaries are paid to Prager and Schlesinger. The claimant calls attention to the fact that the two pages of the ledger on which appear the first two of the Clere Clothing Company accounts mentioned above are creased, intimating that the creasing was for the purpose of closing the accounts. There is no testimony that the creases were made for that purpose. There is an interest account showing that from August 9, 1912, when the first entry was made, until June 2, 1913, there was interest paid [18] monthly on an indebtedness to the National Bank of Commerce. There is no account in the books showing that the Prager-Schlesinger Company was indebted to the National Bank of Commerce. These payments were charged as an expense against the business. The entries on this interest account show that \$210.34 interest was paid to the National Bank of Commerce between January 25, 1913, and June 2, 1913. The entry in the merchandise account under January 25, 1913, shows a debit balance of \$25,007.02. That is, obtained by taking the merchandise at the \$40,000.00 valuation

that the business began with on June 3, 1912, and adding thereto all purchases of merchandise, and deducting therefrom all gross sales of merchandise. This merchandise account was opened on July 27, 1912, showing a balance of \$27,576.51, which balance is the difference between the \$40,000.00 at which the merchandise was capitalized on June 3, 1912, plus merchandise purchased from June 3d to July 27, 1912, less cash sales. On the Clere Clothing Company consignment account, above referred to, the Clere Clothing Company is given credit for goods shipped to the Prager-Schlesinger Company and the account is charged with sundry payments made on account of these goods. The entries on the credit side purport to show that they were made under dates running respectively from June 5th to July 8, 1912, but that the goods were shipped from the Clere Clothing Company from April 17th to June 28, 1912. The credit entries amount to \$21,257.90. The books show that the following debits scheduled by the bankrupt were for goods sold prior to January 25, 1913:

Cluett, Peabody & Company.....	\$346.30
Dogg Dervedon & Company.....	271.35
H. E. Iman & Sons.....	143.50
Lorenz Knit Goods Co.....	180.00

\$941.15.

Exhibit 21, introduced by the trustee, consists of a [19] number of invoices of the Clere Clothing Company prior to January 25, 1913, and subsequent to July 29, 1912, which check with the Prager-Schlesinger Company's books. One, dated August

8, 1912, indicates that the goods were sold to H. L. Gilmore & Company, admitted by Newton to be the same as Clere Clothing Company (See P. 145). The others indicate that the goods were all sold on open account by the Clere Clothing Company to the Clere Clothing Company at Spokane, Washington, on terms, either net or 7% November 1st, or 7% December 1st. Exhibit 20 is two invoices, one dated February 4, 1913, showing goods to the value of \$864.50 sold by Clere Clothing Company to Clere Clothing Company. This is the same invoice as the first of Claimant's Exhibit D, which shows that the goods were sold to Prager-Schlesinger Company. The other invoice, dated March 12, 1913, shows goods to the value of \$649.00 sold to Prager-Schlesinger Company.

The bank account was carried in the name of the Clere Clothing Company from the time it was opened until the bankruptcy. Clere testified (P. 67 of deposition), that he didn't know that the account was carried in this manner until the summer of 1913, and (P. 73), that he never received a check from the Spokane store conducted under the name of the Prager-Schlesinger Company signed in any other way than Prager-Schlesinger Company by Louis A. Schlesinger, President. Dana Child, vice-president of the bank testified (P. 23), that the reason the bank account was carried in the name of the Clere Clothing Company was because "they were the only people that we had any business with. They were the people that we were doing business with."

Under the first objection the trustee has under-

taken to prove that the \$30,640.00 note was not in fact given for the purchase of the Clere Clothing Company's property in Spokane, but that it was given to square accounts between the two corporations that [20] it represents the money the Clere Clothing Company had advanced for the composition, (including \$4,736.02 to pay its own claim in full, \$4,272.20 paid to the Exchange National Bank and expenses of the Clere Clothing Company for attorneys' fees, etc., to the amount of \$3,640.00) plus the value of all goods it had shipped to Spokane, less the money it had already got back from sales, and the return of the dividend checks of various creditors. The trustee insists that the above items of \$4,736.02, \$4,272.20, \$3,640.00 and also the amount of dividend checks turned back by creditors should be deducted from claimant's claim on the \$30,640.00 note. To prove this theory the trustee relies upon the testimony of Richard W. Nuzum, a Spokane lawyer, who represented Schlesinger, Prager and his wife, in a suit brought by them against the Clere Clothing Company just before the present bankruptcy proceedings, and represented the trustee at the taking of the deposition in Syracuse. Nuzum testified that in June or July, 1913, he had a conversation with Clere in Belden's office for the purpose of ascertaining the exact amount of money and merchandise that went into the \$30,640.00 note. That he read to Clere from Trustee's Exhibit 17, a statement prepared by L. A. Schlesinger and told him that Schlesinger claimed that these were the items going into the note (See P. 109), and that the only item Clere disputed

was Belden & Losey, \$250.00; that Clere had claimed that the note represented the amount of the inventory (the one said to have been prepared at the time of the alleged sale on January 25, 1913). Nuzum testified that he had had this inventory; that he didn't examine the items, but that he did know that the total was \$27,254.40, as appears on Trustee's Exhibit 18. (Pp. 124 and 125.) Newton and Belden testified substantially (Pp. 161-162 and 174-175) that the inventory showed the Clere Clothing Company's merchandise and fixtures to amount to \$30,640.00. Belden swore that he wrote the note, and that he took the figures from the inventory before him. Clere's testimony on this [21] subject is damaging. While answering the leading questions of his attorney, Thomas K. Smith, he makes a good witness for the claimant. When cross-examined by Mr. Nuzum, he was evasive, showing a surprising lack of memory of things that a man in his position would naturally know something about and remember, especially things that would hurt his side of the case, and at least leads me to suspect that more than the stock and fixtures was taken into consideration in figuring the amount of the note. (Pp. 55 to 62 of deposition.) Another bit of evidence that strengthens this suspicion is the fact that the books show that on January 25, 1913, all the merchandise on hand amounted to about \$25,000.00, which must have included an item on the inventory mentioned by Newton (P. 161) showing that there was somewhere between \$4,000.00 and \$6,000.00 worth of goods that did not belong to the Clere Clothing Company. If

at the time the books were opened the merchandise was actually worth \$30,000.00 as Clere testified, instead of \$40,000.00 as shown by the books, the Clere Clothing Company stock on hand on January 25, 1913, was worth but from \$9,000.00 to \$11,000.00. And even if Schlesinger thought the \$40,000.00 valuation when the books were opened was correct, still the Clere Clothing Company merchandise on hand January 25th was worth only from \$19,000.00 to \$21,000.00, and it seems that the note must have been given for something else besides stock and fixtures. Still, assuming this to be so, it has not been shown with any degree of certainty for what else it was given. Exhibit 17 was prepared by Schlesinger in his own behalf at a time when he was suing Clere. He gives no testimony concerning it. And Clere's conversation with Nuzum does not seem to me to be an admission that the items, or any particular item shown on the statement did or did not go into the note.

I believe that the contention of the trustee that the Clere Clothing Company and the Prager-Schlesinger Company are one and the [22] same, the latter being merely an adjunct or instrumentality of the former, and that allowing claimant's claims would amount to permitting it to prove debts against itself in fraud of creditors, is proved. To be sure the two are distinct corporate entities, but aside from the legal fiction, it appears to me that the Prager-Schlesinger Company is merely a name under which the Clere Clothing Company transacted its Spokane business. It surely had no assets from

the time of the composition until about the 1st of August, 1912, and the books show that no money was put in the business after that except money received from sales. In July, 1912, it even surrendered its capital stock to Clere, who thereafter held it for the protection of the Clere Clothing Company at least, and decided when it should give the Clere Clothing Company a \$30,640.00 note and when it should commit an act of bankruptcy.

The extremely close relationship shown by other facts indicates that the Prager-Schlesinger Company was not independent of the Clere Clothing Company. Clere's letter about the accommodation notes seems more a demand than a request. Smith's letter of June 27, 1913, shows that the business in Spokane was carefully watched. The bank account remained in the name of Clere Clothing Company from the beginning to the end. The books show no change in the ownership of the business, not even a sign of the alleged sale of January 25, 1913. Clere was here twice before the crash and Newton here all the time. Had the Prager-Schlesinger Company been an independent corporation with which the Clere Clothing Company was doing such a big business, it seems that the knowledge of Clere and Newton of the Prager-Schlesinger Company's weak financial condition, would have caused them to notice and correct such a loose manner of banking and bookkeeping. No bill of sale passed by reason of the alleged sale of January 25th. No mortgage was taken. There was nothing in writing relative to the transfer of the stock to Clere and Newton. These [23]

facts, together with the fact that the Prager-Schlesinger Company continued to pay interest on the Clere Clothing Company's indebtedness to the National Bank of Commerce, and charge it to expense, after the alleged sale of January 25th, convince me that the Clere Clothing Company simply conducted a branch of its business in Spokane under the name of Prager-Schlesinger Company, and endeavored to work the machinery of the Prager-Schlesinger Company, a corporation, in such a manner that if the business failed the creditors and not the Clere Clothing Company would be the principal loser.

An order will be made disallowing both of the Clere Clothing Company's claims in full.

(Signed) SIDNEY H. WENTWORTH,

Referee in Bankruptcy.

Dated September 2, 1914.

[Endorsements]: Certificate of Referee on Review of Order Disallowing Claims of Clere Clothing Company, and Referee's Opinion. Filed in the U. S. District Court for the Eastern District of Washington. September 9, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [24]

[Opinion of Rudkin, D. J.]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1742—IN BANKRUPTCY.

In the Matter of PRAGER-SCHLESINGER
COMPANY, a Corporation,
Bankrupt.

MEMORANDUM.

WAKEFIELD & WITHERSPOON, for Trustee.

BELDEN & LOSEY, for Claimants.

RUDKIN, District Judge. This is a proceeding to review an order of the referee disallowing claims of \$30,640.00 and \$1,610.67, respectively, in favor of the Clere Clothing Company. The former is based on a promissory note, and the latter on an open account for goods sold and delivered. The opinion of the referee contains a full and accurate review of the testimony which need not be repeated here. An examination of the entire testimony leaves a strong suspicion that the promissory note of \$30,640.00 was made up of items aside from the purchase price of the stock of goods transferred on the date of the execution of the note. In other words, there is a strong probability that this note was given to make the Clere Clothing Company whole on account of its dealings with the bankrupt and included other items than the single item for goods sold. But if I am correct in this conclusion it would only be ground for reducing the amount of the claim and would not justify its entire rejection. The other question presented by the objections is by no means free from difficulty. But while the two corporations were separate and distinct I am by no means satisfied that the referee erred in his conclusion that the bankrupt was a mere agent or instrumentality through which the claimant transacted its business here and that to allow these claims against the bankrupt would

be a fraud upon other creditors. The order of the referee is therefore affirmed. [25]

[Endorsements]: Opinion. Filed in the U. S. District Court for the Eastern District of Washington. October 8, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [26]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1742—IN BANKRUPTCY.

In the Matter of PRAGER-SCHLESINGER
COMPANY, a Corporation,

Bankrupt.

**Order Affirming Referee's Order Expunging Claim
of Clere Clothing Company.**

This matter coming regularly on for hearing upon the petition of claimant Clere Clothing Company for review of an order of the referee disallowing claims of the Clere Clothing Company of \$30,640.00 and \$1,610.67, respectively, said claimant being represented by its attorneys, Messrs. Belden & Losey, and the trustee being represented by its attorneys, Messrs. Wakefield & Witherspoon; and the Court having heard the argument of counsel and examined the entire testimony and record in the case, and being of the opinion that the opinion of the referee contains a full and accurate review of the testimony; and that the conclusion of the referee that the bankrupt was a mere agent or instrumentality through which the claimant transacted its business in Spokane and that

to allow said claims against the bankrupt would be a fraud upon creditors, is in accordance with the law and the evidence in this case, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the order of the referee denying said claims and expunging same from the list of claims filed herein be and it is hereby affirmed.

Done in open court this 10th day of October, A. D. 1914.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Due Service of the Foregoing Order by a True Copy Thereof is Hereby Accepted This 10th Day of October, 1914. (Signed) Belden & Losey, Attorneys for Clere Clothing Company. Order Affirming Referee's Order Expunging Claims of Clere Clothing Company. Filed in the U. S. District Court for the Eastern District of Washington, October 10, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [27]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1742—IN BANKRUPTCY.

In the Matter of PRAGER-SCHLESINGER
COMPANY, a Corporation,
Bankrupt.

Petition for Appeal and Order Allowing Appeal.

In the above-entitled cause, the Clere Clothing Company, a corporation under the laws of the State

of New York, conceiving itself aggrieved by the judgment made and entered on the 10th of October, 1914, in the above-entitled cause, affirming the judgment of the Referee in Bankruptcy, disallowing *in toto* the claims and each of the claims of the Clere Clothing Company, and ordering same expunged from the list of claims filed herein, does hereby appeal from such judgment, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers under which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Spokane, Washington, this 17th day of October, A. D. 1914.

(Signed) BELDEN & LOSEY,
Attorneys for Clere Clothing Company.

[Endorsements]: Petition for Appeal. Filed in the U. S. District Court for the Eastern District of Washington. October 17, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. Due service of the within Petition for Appeal by a true copy thereof is hereby admitted at Spokane, Washington, this 17th day of October, 1914. (Signed) Wakefield & Witherspoon.
[28]

The foregoing claim of appeal is allowed this 25th day of November, 1914, upon the condition that the Clere Clothing Company execute a bond as provided by statute, in the sum of \$5,000.00.

(Signed) WM. B. GILBERT,
Circuit Judge. [29]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1742—IN BANKRUPTCY.

In the Matter of PRAGER-SCHLESINGER
COMPANY, a Corporation,

Bankrupt.

Assignment of Errors.

In the matter of the petition of the Clere Clothing Company, a corporation under the laws of the State of New York, for allowance of its claims, rejected by the Referee in Bankruptcy, and the order rejecting said claims by the referee having been reviewed by the above-entitled court, and the order of the referee affirmed.

Assignment of Errors by Clere Clothing Company in the above matter made a part of its Petition for Appeal. The said appellants, Clere Clothing Company, come and for error in the order and judgment of said Court herein, denying and disallowing said claims and each of them, and ordering same expunged from the list of claims filed in said bankruptcy proceedings, assign as follows:

1. The Court erred in finding that the opinion of the referee contained a full and accurate review of the testimony, upon the hearing to the objections of the claims of the Clere Clothing Co.

2. The Court erred in holding that the conclusion of the referee that the bankrupt was a mere agent or instrumentality, through which the Clere Clothing

Company transacted its business in Spokane, and that to allow said claim against the bankrupt would be a fraud upon creditors.

3. The Court erred in signing its order and judgment herein complained of, for the reason that said order and judgment is at variance and not supported by the finding of the Court in his opinion handed down in said cause.

4. The Court erred in disallowing and ordering expunged, the claim of the Clere Clothing Company for thirty thousand six [30] hundred forty (\$30,640) dollars, for the reason that the record does not disclose the fact that said claim was made up of items aside from the purchase price of the stock of goods, transferred by the Clere Clothing Company to the Prager-Schlesinger Company on the date of the execution of the note exhibited in plaintiff's complaint, of thirty thousand six hundred forty (\$30,640) dollars.

5. The Court erred in disallowing said claim, and based its opinion for so doing, as suggested in the opinion of the Court, on "strong suspicion" that said claim was made up of items aside from the purchase price of the stock of goods, and not based upon the record or the evidence in the cause.

6. The Court erred in signing said judgment and order complained of, for the reason that said judgment is not warranted by the opinion and findings of the Court herein, but that as shown by the opinion of the Court, same is based not upon fact, but as stated by the Court: "There is a strong probability that this note was given to make the Clere Clothing

Company whole on account of its dealings with the bankrupt, and included other items than the single item for goods sold.” That if said judgment of the Court was in accordance with the fact, the Court erred in not ordering a hearing to determine what of said whole amount, was improperly charged in said item, and in refusing to allow said claim for the amount less such unlawful items included in said claims, as suggested by the Court.

7. The Court erred in holding that the bankrupt was a mere “agent or instrumentality,” through which the Clere Clothing Company acted, and the Court further erred in holding that to allow said claim, or either of said claims of Clere Clothing Company against the bankrupt, would be a fraud against the other creditors.

8. The Court erred in holding and adjudging that that part of the Clere Clothing Company’s claim in the sum of sixteen hundred ten and 67/100 (\$1,610.67) dollars, should be expunged for [31] the reason that there is disclosed from the record, no evidence that said goods were not sold and delivered, as alleged and set out in the claim of Clere Clothing Company presented before the Referee in Bankruptcy, and for the further reason that the evidence discloses and shows conclusively that the items going to make up said sum of sixteen hundred ten and 67/100 (\$1,610.67) dollars was sold and delivered in the usual course of business.

WHEREFORE, the said Clere Clothing Company prays that the judgment of the District Court be re-

versed, with directions to said Court to allow its claims.

(Signed) BELDEN & LOSEY,
Attorneys for Clere Clothing Company.

[Endorsements]: Due service of the within Assignment of Errors by a true copy thereof, is hereby admitted at Spokane, Washington, this 17th day of October, 1914. (Signed) Wakefield and Wither-spoon. Assignment of Errors. Filed in the U. S. District Court for the Eastern District of Washington. October 17, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [32]

United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of PRAGER-SCHLESINGER
COMPANY, a Corporation,
Bankrupt.

Citation [on Appeal (Copy)].

United States of America,
Ninth Judicial Circuit,—ss.

To the Union Trust & Savings Bank, Trustee,
Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in said Circuit, on the 24th day of December, 1914, pursuant to a petition on appeal and assignment of error filed in the Clerk's office of the District Court of the United States for the East-

ern District of Washington, Northern Division, in the matter of Prager-Schlesinger Company, a corporation, bankrupt, to show cause, if any there be, why the judgment rendered in said cause on the 10th day of October, 1914, denying and expunging from the list of claims filed in said cause, the claims of the Clere Clothing Company and disallowing each of said claims, as proved by said Clere Clothing Company before said referee, in the sums of \$30,640 and \$1,610.67, respectively, as in said petition on appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

WITNESS the Hon. WM. B. GILBERT, Judge of said Circuit Court, this 25th day of November, in the year of our Lord, 1914, and of the Independence of the United States of America the one hundred thirty-ninth.

[Seal] (Signed) WM. B. GILBERT,
Circuit Judge. [33]

[Endorsements]: Service of the within Citation admitted at Spokane, Wash., this 27th day of November, 1914. (Signed) Wakefield & Witherspoon, Attorneys for Union Trust & Savings Bank, Trustee for Prager-Schlesinger Company. Citation. Filed in the U. S. District Court for the Eastern District of Washington. November 27, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [34]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

In the Matter of PRAGER-SCHLESINGER
COMPANY, a Corporation,
Bankrupt.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Clere Clothing Company, as principal, and American Surety Company of New York, are held and firmly bound unto the Union Trust & Savings Bank, Trustee in Bankruptcy for Prager-Schlesinger Company, in the full and just sum of five thousand (\$5,000) dollars, to be paid to said Union Trust & Savings Bank, its certain attorneys or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of November, A. D. 1914.

Whereas, lately, in the District Court of the United States for the Eastern District of Washington, Northern Division, in a matter depending in said court between Clere Clothing Company and the Union Trust & Savings Bank, Trustee in Bankruptcy for the Prager-Schlessinger Company, a decree and order was rendered against the said Clere Clothing Company, denying its said claim and expunging same from the list of claims filed in said bankruptcy proceedings, and the said Clere Clothing Company hav-

ing obtained an appeal and filed a copy thereof in the Clerk's office of the said the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree and judgment in aforesaid matter, and a citation directed to the said Union Trust & Savings Bank, Trustee in Bankruptcy for the Prager-Schlesinger Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals [35] for the Ninth Circuit, to be holden at the City of San Francisco, in said Circuit, on the 24th day of December, next.

Now the condition of the above obligation is such that if the said Clere Clothing Company shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) CLERE CLOTHING COMPANY,
By E. H. BELDEN,
Its Attorney.

[Seal of Surety]

AMERICAN SURETY COMPANY OF
NEW YORK,

By FRANK A. PAINE,
Resident Vice-President.

By F. E. BRISBINE,
Resident Assistant Secretary.

The foregoing bond is approved this 25th day of November, 1914.

(Signed) WM. B. GILBERT,
Circuit Judge.

[Endorsements]: Bond on Appeal. Filed in the U. S. District Court for the Eastern District of Washington. November 27, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [36]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

Stipulation [That Clere Clothing Co. Have Until January 1, 1915, to Serve, etc. Proposed Bill of Exceptions.]

In the Matter of the Estate of PRAGER-SCHLESINGER COMPANY,

Bankrupt.

Clere Clothing Company has until January 1, 1915, to serve and file its proposed bill of exceptions, settlement of same to be made thereafter at earliest convenience of the Court, without waiving the right to question jurisdiction of court in granting the right of appeal.

(Signed) BELDEN & LOSEY,
Attorneys for Clere Clothing Company.

(Signed) WAKEFIELD & WITHERSPOON,
Attorneys for Union Trust & Savings Bank, Trustee.

[Endorsements]: Stipulation. Filed in the U. S. District Court for the Eastern District of Washington. November 30, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. [37]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

In the Matter of the Estate of PRAGER-SCHLES-SINGER CO., a Bankrupt.

Bill of Exceptions.

BE IT REMEMBERED, that in the above-entitled cause, same came on for hearing from time to time, upon the exceptions filed to the claims of the Clere Clothing Co., the Trustee being represented by its attorneys, Wakefield & Witherspoon, and the claimant, Clere Clothing Co. being represented by its attorneys Belden & Losey.

The following evidence was offered in resistance to the allowance of said claim, and in support of same, to wit: [38]

[Testimony of Harry L. Cohn, for Trustee.]

HARRY L. COHN was called as a witness on behalf of the Trustee and testified as follows:

My name is Harry L. Cohn and I am a practicing attorney at law in Spokane, and was during the fore part of the year 1912 one of the members of the firm of Cohn, Rosenhaupt & Grant. The firm of Cohn & Rosenhaupt represented Praeger-Schlessinger Company in the former bankruptcy proceedings in the District Court of the United States for the Eastern District of Washington, Northern Division, being Case No. 1343 being the case previous to the one now on hearing. That bankruptcy proceeding was closed by composition some time in 1912 and we were

(Testimony of Harry L. Cohn.)

the attorneys for the Praeger-Schlessinger Company in those proceedings up to and including the time of the composition. I was acquainted with Mr. Smith who was in Spokane at the time of the bankruptcy proceedings, presumably representing the Clere Clothing Company, and it was my understanding that he was acting as representative of the Clere Clothing Company while here. I had several conversations with him with reference to the composition made prior to the composition taking effect. I presume a month or six weeks previous, we were discussing it from time to time. I had no direct conversation with the Clere Clothing Company with reference to taking over the business of the Praeger Company and running it for the Clere Clothing Company. We had a number of conversations in regard to the Clere Clothing Company furnishing the money for the composition, and permitting the Praeger people to attempt to pull it out of debt. I could only give you my general impression of what the substance of these conversations were. I would not pretend to represent any conversation or even the substance of any conversation. I can only give you my understanding of what the conversations lead up to meant, that is my recollections of the conversations. My [39] understanding of the conversations was that the Clere Clothing Company was to advance the money for the composition: That part of the money was to be returned to them on certain claims, for instance the claims we had and other claims. The amount of the composition was to be returned to them, and Schles-

(Testimony of Harry L. Cohn.)

singer, as I recall, was to have charge of the business and at such time as the debts were paid they would turn over to him the residue of the stock on hand. I don't know whether or not the capital stock of the corporation was turned over to Mr. Smith or to the Clere Clothing Company for that purpose, and was surprised when I heard that the name Praeger-Schlessinger Company was to be used after that. I didn't know anything about that. My understanding was that Schlessinger was to have charge of it and that the Clere Clothing Company was advancing the money and at any time that he could pull the place out of debt the stock was to be turned over to him. I mean the merchandise stock; I don't mean the capital stock. As to whether or not there was any agreement in that conversation whereby the Exchange National Bank was to receive the preference or a sum in addition to 25%, I can only tell you what Mr. Smith told me about that. I remember distinctly that conversation. Mr. Smith told me that Mr. Coman told him unless a greater amount was paid to the bank than was paid to others, he would refuse to accept it and would prosecute Mr. L. Praeger criminally and for that reason the bank forced them to pay them, as I recall, 50% more than any other creditor. I do not know whether that was paid or not. Mr. Smith told me that the bank would block the composition unless they got more money and that they were forced to give it to them. With reference to the claim of Cohn & Rosenhaupt, as to paying it back, we didn't accept a check. There was

(Testimony of Harry L. Cohn.)

a friendly relation between Praeger and Schlessinger and the members of our firm. When the composition [40] was made we gave them back their money. I don't believe we ever took any money in any way from them. I don't know whether or not that check was turned over to Smith or to Praeger and Schlessinger; Mr. Grant did it. I don't know whether he endorsed the check or how he gave it, but I will tell you I know we did not take it; we gave it back. We got \$125.00 or something like that and we gave it back to them. I understand a number of the other creditors did the same thing. That is they gave back their check for the purpose of putting the composition through and in order to help these people out.

Cross-examination.

It may be a fact that Mr. Smith told me that he had purchased the claim of the Exchange National Bank. Whether he purchased it or whether they were taking a larger amount I don't know, I know that it was costing more than the others and that may be true. He may have purchased it, I don't know. Mr. Smith may have told me that he had purchased that claim. I have not any independent recollection of that. We had a valid claim against the Praeger-Schlessinger Company and so far as I know, the other claims where the checks were given back were also valid claims, especially the claim of Mrs. Louis Praeger who practically bankrupted herself in order to give it back.

[Testimony of Dana Child, for Trustee.]

DANA CHILD was called as a witness on behalf of the Trustee and testified as follows:

My name is Dana Child and I reside in Spokane, and was Vice-president of the National Bank of Commerce during the year 1912 and had dealings with the Clere Clothing Company during the year 1912, that is the bank had dealings. I had conversations with Mr. Thomas K. Smith representing the Clere Clothing Company in reference to some loans by the bank. I understood he was '[41]' acting as attorney for the Clere Clothing Company. He did not represent to me that he was an officer of the company. I had sole charge of the dealings and transactions with Mr. Smith. I had some conversations with Mr. Smith with reference to borrowing certain moneys from the bank. He wanted to borrow a certain sum of money; I have forgotten the amount, I didn't think it was as heavy as \$26,000.00. My recollection is somewhere about \$24,000 but I couldn't say. I was thinking about 24,000 that the Clere Clothing Company wanted to borrow and went on through the conversation in regard to whether we would loan him that much money. We took it up and got a line on the Clere Clothing Company and we loaned him the money. He told me what it was for, that they had bought or were going to buy the stock of the Praeger-Schlessinger Company and go on and do business. He further stated that they were going to carry an account with our bank and that they would run that business, and

(Testimony of Dana Child.)

I think it was the verbal agreement that they should carry thereafter about 20% of the loan as a daily balance, but this agreement was for no particular time, and they afterwards opened a checking account, and that is what I have referred to as a daily balance. There was an account open in the bank in the name of the Clere Clothing Company which was carried as such perhaps about a year. It was not carried as the Clere Clothing Company until this last bankruptcy, it didn't run that long. It was closed before the Receiver was appointed by the Court. My recollection is that some time last spring they were keeping no account, that is there was no money being deposited and virtually no money there. There might have been a dollar or less and I wrote to the Clere Clothing Company and told them we would have to call our loan, that they were not depositing any money and the account wasn't worth anything. I should say there was a small balance there until the Receiver was appointed. I [42] could not really say whether that letter I wrote to Mr. Smith was some time in 1913. There was some balance on these notes and I threatened to call it and then the loan was afterwards taken up. I imagine at the time the checking account was opened I took the signature cards, but I could not testify as to when I took the signature cards; if the account was opened with me I would take the signature cards. Whoever opens the account—sometimes these accounts are opened by the president, sometimes the vice-president and sometimes the cashier, but whoever opens

(Testimony of Dana Child.)

the account takes the signature cards. At all times from the time the account was opened in 1912 until it was closed in 1913, it was always carried as the Clere Clothing Company account, and there was no change or any directions to make a change, and that was operated under my understanding with Mr. Smith. (It was here conceded by counsel for the Clere Clothing Company that Thomas K. Smith was Secretary of the Clere Clothing Company at the time of these bankruptcy proceedings.)

Referring to Cashier's check No. 3309 I remember how that happened to be used. A note was given to the bank for it. I didn't talk with Mr. Smith in reference to the issuance of that cashier's check—I had no conversations with him in reference to that. I haven't the note that it was given for. The note was paid and delivered up and I am quite sure it was mailed to the Clere Clothing Company, Syracuse, New York. The note was signed Clere Clothing Company by Thomas K. Smith. We had resolutions from the Clere Clothing Company authorizing him to sign it and authorizing the loan to be made. I doubt whether we have those resolutions in the bank, I think they were returned when the notes were paid. That was before the last bankruptcy proceedings. I don't remember when it was, but I know that is the usual way we do, when the matter is closed all papers in the case are returned. [43] As to the endorsement on that cashier's check I couldn't say whether or not that is the endorsement of Mr. Smith.

(Counsel for the Clere Clothing Company here

(Testimony of Dana Child.)

admitted that the signature on the back of the check is that of Thomas K. Smith.) The endorsement shows that it was paid through the Clearing House on the 8th of June. (Said paper was marked "Trustee's Exhibit 1"). As to cashier's check No. 3336 that was issued on account of the note given us by the Clere Clothing Company. These notes are the notes I referred to when I testified to my conversation with Mr. Smith. As to check No. 3337 that was given earlier. For these cashier's checks one note was given. There were not three notes, I might be mistaken about that. I took one of these notes, I think to the First National Bank at Hillyard—\$2500.00—I think there were two for \$2500.00 and the other for \$1900.00. Those were all signed by the Clere Clothing Company. Those payments were made on those notes from time to time by the Praeger-Schlessinger Company. They were not paid in full but payments were made by checks issued by Praeger-Schlessinger Company. I don't recollect whether or not all the interest on these notes, from the time they were given up to the time of the receivership just preceding this last bankruptcy, was paid through checks issued by Praeger-Schlessinger and paid out of the Clere Clothing Company account.

(Said checks were marked respectively, "Trustee's Exhibits 2 and 3.")

As to whether or not the interest on these notes were paid by checks signed Praeger-Schlessinger Company by Schlessinger and drawn out of the Clere Clothing Company account from the time

(Testimony of Dana Child.)

they were issued up to the time of the last bankruptcy proceeding, I might be mistaken but I don't think so. There were items of Forty-five dollars and some odd cents monthly items of interest on these notes but I don't think they paid all the payments that were [44] made. Interest was paid by the business here in Spokane that was conducted under the name of the Praeger-Schlessinger on these notes from time to time. Up to some time in June, 1913, in the spring Clere quit paying and then is when I called the loan. I think a great many of the principal payments were made on these notes through this Praeger-Schlessinger business. These cards that you show me are signature cards of the Clere Clothing Company representing the account carried in our bank given us by Mr. Schlessinger. That was the account I referred to that Mr. Smith agreed to carry in our bank. We had no account other than the Clere Clothing Company account in which the Praeger-Schlessinger business was transacted. All of the checking business here done as Praeger-Schlessinger was carried in the Clere Clothing Company account. The checks were signed Praeger-Schlessinger Company. I couldn't answer whether some of the checks were signed Clere Clothing Company.

(Said cards were marked Trustee's Exhibits 4 and 5 respectively).

Cross-examination.

(By Mr. BELDEN.)

Q. Now, this account was carried in the name of

(Testimony of Dana Child.)

the Clere Clothing Company, was it not, Mr. Child, for the reason that the comptroller of the currency or the bank examiner would require that as you had made the Clere Clothing Company the loan the account should be carried in the name of the Clere Clothing Company? State what are the facts as to that.

A. I would not loan anyone any money if they didn't have an account.

Q. And that was the reason why the accounts were taken in the name of the Clere Clothing Company—was it not one of the reasons?

A. Well, I loaned the Clere Clothing Company and the agreement was that it was. [45]

Q. How did it come that you paid the checks of the Praeger-Schlessinger Company then on the Clere Clothing Company account?

A. Well, Mr. Belden, of course, there is one thing that is kind of careless and I will have to acknowledge that I can't explain that satisfactorily, because there is no explanation that can be made. It was done.

Q. The only reason for carrying the account in the name of the Clere Clothing Company is because they were large borrowers at the bank, is it not?

A. Well, they are the only people we had any business with.

By Mr. WITHERSPOON.—They were what?

A. The only people that we had any business with. They were the people that we were doing business with. This account in the name of the Clere Cloth-

(Testimony of Dana Child.)

ing Company was started June 29th about the time that Gilmore was running the business. They didn't commence doing business up there before July 29th. This signature card wasn't given at the time the account was opened. It could not have been, because Gilmore opened the account of the Clere Clothing Company. Gilmore was running the business for the Clere Clothing Company after the composition had been made and the stock turned over to the Clere Clothing Company. I couldn't say whether or not at the time this signature card was taken Mr. Smith was there. I couldn't say whether or not the signature card was signed about the time that they moved from the Riverside Place to 111 Howard. I don't recollect the time when they moved. I knew Mr. Gilmore who had been conducting the sale for them up on Riverside Avenue and during the time he was conducting that sale the account was carried as the Clere Clothing Company. Then afterwards they moved from the Riverside location to Howard Street. I don't remmber about the time Mr. Gilmore left, when they quit their sale up there he left. I don't recollect in regard to the month. [46] I don't know whether it was taken by Mr. Gilmore or under Mr. Gilmore's direction or not. I couldn't really answer as to whether checks drawn by the Clere Clothing Company and all other checks drawn which were paid upon the account of the Clere Clothing Company were signed Praeger-Schlessinger Company, because I never see the checks that come into the bank. I didn't look over the checks a short time

(Testimony of Dana Child.)

ago with Mr. J. D. Campbell and Mr. Belden. We would see the figures on the ledger from the checks.

Redirect Examination.

These debit slips and monthly statement shown to me show the payment of these notes where we debited the account at the time I had my conversation with Mr. Smith in reference to this checking account it was understood that Mr. Schlessinger was to handle the business here and the money was to be checked out by Mr. Schlessinger. The understanding with Mr. Smith was that as fast as Mr. Gilmore took the money in, I could charge up to their account whatever was over \$500.00 or \$800.00—it was either \$500.00 or \$800.00,—charge it up to the notes. It was understood that the Clere Clothing Company was to operate the business here and that whatever came in we could charge up over \$500.00—either \$500.00 or \$800.00. They wanted enough left on hand so as to pay running expenses. That was the agreement with Mr. Smith and we did so from time to time.

(Said papers were marked “Trustee’s Exhibits 6 and 7.”)

These papers or statements shown to me are monthly statements of the Clere Clothing Company account with the National Bank of Commerce.

(Said paper composed of 11 sheets, was marked “Trustee’s Exhibit #8.”)

The account was carried by our bank up to June, 1913.

Recross-examination.

The Praeger-Schlessinger Company wasn’t a de-

(Testimony of Dana Child.)

positor with our bank [47] before they went into bankruptcy. Their place of business was in the Realty Building on Riverside. In May or June, when Mr. Smith came to Spokane when he borrowed the money from us—twenty odd thousand dollars, he told me that the Clere Clothing Company was going to buy the stock of the Praeger-Schlessinger Company. I would not say who he was going to buy the stock from. He said they were going to put on a sale and that the Clere Clothing Company did put on a sale at the Realty Building, but H. L. Gilmore was in charge of that sale. Mr. Gilmore deposited money in our bank as long as he was here. He deposited money in our bank and I imagine those signature cards were made just about the time he ceased depositing money in our bank—about the time Mr. Gilmore left town. I think that when Mr. Gilmore turned the stock over to Louis Schlessinger, I took these deposit memorandum slips from Louis Schlessinger. I don't think Mr. Smith was in town at the time I took these deposit slips from Schlessinger. This conversation that I referred to took place at the time the note was executed along in May or June.

Re-redirect Examination.

I didn't have any instructions at any time to change that account or change the form of checking against that account. I didn't from time to time send statements or letters to Mr. Smith of the Clere Clothing Company in reference to interest payments on the notes. I renewed the notes from time to time. The notes would show the interest payments. We would

(Testimony of Dana Child.)

endorse the interest payments on the back and the different payments. We did not at any time receive any letters from Mr. Clere or Mr. Smith objecting to these interest payments on these notes or any question in reference to them. These interest payments were made by checks drawn on this account in question. The checks show themselves [48] how they were signed. As long as the Clere Clothing Company's account was with the bank a statement was made at the last day of each month, and as far as I know, those statements all show that the account was carried in the name of the Clere Clothing Company, the only account that I know of. I could not say whether those monthly statements were delivered to Louis Schlessinger too, or to the Praeger-Schlessinger Company at 111 Howard Street. I couldn't answer whether there are checks signed by Gilmore & Company or drawn while Gilmore was here. I have checked these statements for June and July and find that no checks were drawn while Mr. Gilmore was here and only checks drawn on the Clere Clothing Company account were drawn by Mr. Schlessinger, to the best of my recollection.

[Testimony of T. T. Grant, for Trustee.]

T. T. GRANT, called as a witness by the trustee, testified as follows:

My name is T. T. Grant; I am an attorney at law and reside in Spokane. I represented a number of creditors in the original bankruptcy proceedings of the Praeger-Schlessinger Company—I don't remember just how many now. I don't recall any par-

(Testimony of T. T. Grant.)

ticular conversations with Mr. Smith as the secretary of the Clere Clothing Company in reference to the composition, about how the matter was to be handled after composition. I had an understanding with Mr. Smith as to what was to be done. I don't remember whether it was through a direct conversation with Mr. Smith or through a discussion in our office between Mr. Smith and the other members of the firm or not. I had conversations with Mr. Smith; I don't remember any of the conversations I had. It was my understanding that the Clere Clothing Company was taking over the Praeger-Schlessinger business and operating it, but I don't recall any particular conversations with Mr. Smith. He was in the office there a number of times. The dividend checks of a [49] number of creditors of the Praeger-Schlessinger Company were turned over to the creditors and some of them were turned back to Mr. Smith—I think Mr. Smith or Mr. Belden—I am not sure which. I think the check to James J. Murphy for \$89.21 was turned back to Mr. Smith—the endorsement would probably show. I think I endorsed some of these checks back directly to Mr. Smith, but perhaps I didn't. My recollection is that all these were turned back to Mr. Smith with exception of one payable to Burcham M. Ball and that was paid back to Mr. Belden for the purpose of turning it over to Mr. Smith I think, who was representing the Clere Clothing Company. Mr. Belden was representing the Clere Clothing Company at that time. That is how I happened to turn it over to him; that was sub-

(Testimony of T. T. Grant.)

sequent to the time I got the first checks if I recall. That check was held up for some reason or other and Smith had gone before that check was turned over to me, and I turned it back to Mr. Belden.

(Said papers were marked Trustee's Exhibits 9-10-11-12-13-14 and 15 respectively.)

[Testimony of Joseph Bailey, for Trustee.]

JOSEPH BAILEY was called as a witness on behalf of the trustee and testified as follows:

My name is Joseph Bailey and I reside in Spokane, Washington, and am connected with the National Bank of Commerce and was connected with the National Bank of Commerce in the year 1912 in the capacity of Assistant Cashier. As such Assistant Cashier of said bank, I had charge of the Clere Clothing Company account and was instructed in reference to it. Well, at that time I was acting as teller, both paying and receiving teller, and when the account would be opened if there were any instructions given they would be given by the Cashier, Mr. Cook, or Mr. Child or Mr. March, whoever happened to open the account. I think Mr. Child opened the account of the Clere Clothing Company. I received my [50] instructions from Mr. Child who opened the account. The account was carried on the ledger as the Clere Clothing Company and the signature cards were taken; the signatures of Praeger-Schlessinger Company. We were advised that the deposits made by Praeger-Schlessinger Company were to be handled through the Clere Clothing Company account on our books. I was instructed to

(Testimony of Joseph Bailey.)

honor the checks of the Praeger-Schlessinger Company through that account and did so. That instruction was given me at the time those cards were taken on the account; that would be after the account was opened. I don't believe during the time this account was operating I received any checks drawn by anyone other than those executed by Mr. Schlessinger. I don't think there were any checks drawn by Mr. Gilmore or Mr. Levy representing Gilmore & Company. At all times from June, 1912, up to and including June, 1913, we carried the Clere Clothing Company account in the same manner, as the Clere Clothing Company, on the ledger and there was no changes made at all in the account other than checking the deposits. There was interest paid on the notes of the Clere Clothing Company through this account, but I don't remember up to what date payments were made through the account, but I remember at different times payments were made through the account. I don't remember how much interest was paid on those notes. I could not answer as to whether or not we received any interest from the Clere Clothing Company in the east up to June, 1913; the books wouldn't show it.

[Testimony of William A. Yoemans, for Trustee.]

WILLIAM A. YOEMANS, called as a witness by the Trustee, testified as follows:

My name is William A. Yoemans and I reside in Spokane and am Credit Manager for the Spokane Dry Goods Company and was such Credit Manager in the year 1912 and as such Credit Manager [51]

(Testimony of William A. Yoemans.)

had something to do with the account of goods sold to the Clere Clothing Company during the year 1912. It was about May or June, 1912, when we opened the account. I made investigation as to the account, that is as to how it was to be operated and how the concerns were to be conducted. Mr. Schlessinger came up to my office and asked to open an account in the name of Praeger-Schlessinger and we refused to sell him. Mr. Schlessinger advised me that the stock at that time was owned by the Clere Clothing Company except one share held by Mr. Newton and one share by himself. I advised him I would not sell anyone except the Clere Clothing Company owners of the business, and he finally consented and opened the account that way. We handled it at all times as the Clere Clothing Company and from time to time goods were put in the name of the Clere Clothing Company and up to June or July, 1913, the time of the receivership, these goods were delivered at 111 Howard Street, the place where the Praeger-Schlessinger Company's business was being conducted. At the suggestion of Mr. Schlessinger I made enquiry of the bank in reference to that Clere Clothing Company business. I went to the bank and talked to Mr. Child and he advised me that Mr. Smith of the Clere Clothing Company had made arrangements with them for handling an account there to cover this business being run at 111 Howard Street and they were running the business and that the accounts would be taken care of.

Q. Did you, Mr. Yoemans, ever receive a letter or

(Testimony of William A. Yoemans.)

see a letter from the Clere Clothing Company in reference to the Spokane Dry Goods Company account in which they admitted their liability?

A. Yes, sir.

Mr. BELDON.—Now, I move to strike that and I want to put in an objection. He says whether he saw a letter or received a letter in which they admitted their liability. That is improper; the letter speaks for itself. Let them produce the letter.

The REFEREE.—Of course, the letter is the best evidence; no [52] doubt about that.

Mr. WITHERSPOON.—Have you that letter?

A. No, sir.

Q. When was it you saw it?

A. Well, I beg your pardon; if you ask me if I saw the letter I did not see the letter.

Q. Well, I understood you to say that you saw the letter. A. No, sir.

Q. Was it read to you?

A. No, sir, it was quoted to me.

Q. It was quoted to you? A. Yes, sir.

Q. Did you never have the letter in your possession?

A. No, I never had the letter. The Spokane Dry Goods Company, through the Merchants' Association, sued the Clere Clothing Company and got judgment on its account. During the time this account was run at the Spokane Dry Goods Company part of the indebtedness was paid. The first check issued to us was signed the Clere Clothing Company by L.

(Testimony of William A. Yoemans.)

A. Schlessinger; the balance were paid by checks signed Praeger-Schlessinger by L. A. Schlessinger.

[Testimony of Fred Stoltz, for Trustee.]

FRED STOLTZ was called as a witness by the Trustee and testified as follows:

At present I reside at Careywood, Idaho, and was the Trustee in Bankruptcy of Praeger-Schlessinger, bankrupt in which a composition was made in 1912. As Trustee of the Praeger-Schlessinger Company, bankrupt, I received no moneys or funds other than those shown by the orders of the Court on file in Case 1343. No other moneys were received to my knowledge other than those sums by the Praeger-Schlessinger Company while I was Trustee in Bankruptcy. Those funds were deposited in Judge Rudkin's name and an order issued by him directing me to draw on that account, checks of course in the usual course subject to be countersigned by the referee. The approximate amount of the fund was to about \$21,500. There was no such an amount as \$26,000 received [53] or checked out. No money was received by me as trustee in addition to the \$21,500 approximately.

[Testimony of Edwin T. Coman, for Trustee.]

EDWIN T. COMAN, called as a witness on behalf of the trustee, testified as follows:

My name is Edwin T. Coman, residence, Spokane, Washington. I am President of the Exchange National Bank of Spokane and was such President in the month of April, May and June, 1912. The Exchange National Bank had a claim against the

(Testimony of Edwin T. Coman.)

Praeger-Schlessinger Company in the former bankruptcy proceedings in 1912. I know how much the Exchange National Bank received on its claim. We received \$4,272.21 in the bankruptcy proceedings. As to whether we received any further amount we sold our collaterals and claim against the Praeger-Schlessinger Company for \$4,272.21. These collaterals were put up by the Praeger-Schlessinger Company. These collaterals were the personal guarantee of Praeger and Schlessinger and—well, there were three or four parties to the guarantee and the guarantee of the Praeger Company which controls certain mining interests in the Coeur d'Alenes; also a note of \$2,000.00 of Clara Praeger secured by a mortgage on her home on Cannon Hill. I don't know that it is a fact that at the time we filed our claim in the Bankruptcy Court and before it was allowed we waived our call on that collateral security. I think Mr. Hindman of Cullen, Lee & Hindman represented our claim at the former bankruptcy proceedings and the Exchange National Bank filed its claim in the former bankruptcy proceedings. At the time we filed our claim in the former proceedings, we had this collateral above referred to which we sold for \$4,272.00, and I don't know whether he prepared—as to whether or not we had any instrument in writing from the parties who gave us the collateral authorizing us to sell it; this matter was handled by Mr. Hindman and I don't [54] know whether he prepared any such instrument or whether there was any—I don't remember.

(Testimony of Edwin T. Coman.)

Q. Now, the claim that was filed in the bankruptcy proceeding for the Exchange National Bank for \$16,250.00, among other things says: "That said claimant has not, nor has any person by his order or to the knowledge or belief of said deponent, for claimant's use, had or received any manner of security for said debt whatever." Now, was that correct at that time or was it not, Mr. Coman?

A. What time was that?

Q. At the time the claim was filed in the Bankruptcy Court on the 24th of April, 1914.

A. That is the 24th of April, 1912; I am inclined to think that we had that mortgage and we had that guaranty and the endorsements of these different parties. The additional amount that we got was \$4,272.21 making a total of \$8,544.41 and I should judge from the fact that these figures are approximately the same, that was 25% in addition to what we received from the Trustee in Bankruptcy—25% of that claim in addition to what we received from the Trustee in Bankruptcy. We received it about the time we received the other. The additional amount of \$4,272.20, or whatever it was, was credited on the bank's books either to the notes or profit and loss account. I don't remember whether this had been charged off or not. That was credited to the \$16,000 of notes, copies of which we filed in the original proceedings and this collateral that I have referred to we had paid nothing for. It was merely collateral for the notes that we filed in the bankruptcy proceedings. The only interest we had in

(Testimony of Edwin T. Coman.)

them was as collateral to those notes that were filed in the original bankruptcy proceeding. In dealing with reference to the additional \$4,200.00 I dealt with a representative of the Clere Clothing Company, Thomas K. Smith. I don't know that I knew he [55] was secretary; I thought he was an attorney out here. I think the first conversation I had with him in reference to the additional \$4,272.00 was prior to the 8th day of June; I couldn't remember whether it was in May or April. Mr. Smith was here for a considerable time and I saw him a number of different times. I couldn't remember the date after a lapse of two years.

Q. You don't remember the date of the composition? A. No.

Q. The order confirming the composition was May 16th, 1912?

A. That was about three weeks before this was paid.

Q. Do you remember having some conversation with Mr. Smith prior to that time, about the 12th of May, a few days before, with reference to the composition?

A. Why, it would be impossible after this lapse of time to say on the 12th of May or the 20th of May.

Q. Well, a few days prior to that time?

A. I couldn't say. I don't remember by what individual this security was brought in, but the guaranty was signed by—I don't know whether it was signed by anyone outside of the stockholders in the corporation or not. The guaranty was brought in

(Testimony of Edwin T. Coman.)

by Mrs. Praeger and the Praeger Company was a corporation supposed to be engaged in the mining business in Idaho and to have some mining claims. If it is a fact that Mrs. Praeger's \$2,000.00 mortgage that you refer to was surrendered up in the Bankruptcy Court at the time that your claim was allowed and turned over to Mrs. Praeger in the courtroom, I don't recollect it. It might have been done or the attorney might have done it and I would not know about it; I don't remember. As to having anything to do with the filing of our former claim and attendance in court as a witness, I was in court once I remember. That wasn't the time that Mr. Belden was objecting to the allowance of the claim of the bank. I think he was objecting to the allowance of our claim at that time. If at that time I surrendered up all the collateral that we had and agreed to surrender the collateral [56] so that our claim should be filed, I don't remember it. I did whatever my counsel advised me to do. I turned over all that I had left then. If that \$2,000.00 mortgage wasn't in the papers turned over to Mr. Smith, why then I didn't turn it over, but I supposed—

Q. Now, do you know what you did turn over to Mr. Smith or do you know that you turned anything over to Mr. Smith?

A. Oh, yes. I don't seem to have any memorandum of it here but I did turn over to Mr. Smith a financial statement of the Praeger-Schlessinger Company in addition to the documents. I turned over this guaranty to these outside parties; that was

(Testimony of Edwin T. Coman.)

our regular form of guaranty for a corporation that the bank usually has. There were four or five parties to it, there was M. Praeger and L. Praeger and Schlessinger, and I think there were one or two more; supposed to be all the people connected with the concern, to get their personal endorsement—personal guaranty. I think that I turned over this \$2,000.00 note but if I had turned it in previously, of course, I couldn't have done so. Outside of that \$2,000.00 note, I would what I referred to as collateral was the guaranty of these stockholders—I consider that a guaranty. It is the general guaranty of all obligations that might be due to the bank. If the parties were good it was valuable. I wasn't sure about whether any of them was good at that time. The mine was supposed to be in the name of M. Praeger, I believe, M. Praeger Company, we had their endorsement also. It wasn't signed on that guaranty; it was on a separate endorsement or guaranty. I think they endorsed each note of the Praeger-Schlessinger Company as it came up. It shows on the copy—on the notes there that we filed.

Q. Now, then, as far as you can recollect, all that you turned over to Mr. Smith for this \$4,272 were these papers; that is this guaranty and the financial statement of Praeger-Schlessinger [57] made by Praeger; is that all?

A. Well, I am still of the opinion that I turned over that \$2,000.00 note; though, of course, if it was turned over in the Court I could not have done so. If the record shows that it was turned over in court

(Testimony of Edwin T. Coman.)

then I would be mistaken on that. With reference to turning over these guaranties, I had numerous conversations with Mr. Smith in reference to turning over these guaranties. He was out here perhaps a month or two months; he was out here about the time the Praeger-Schlessinger Company failed or very shortly afterwards, and I had conversations with him in reference to our notes. It is hard to say what my first conversation was with Mr. Smith in reference to a composition. I couldn't say when the conversation was. At the time this proposed composition came up, or proposition for composition, we were opposed to it and instructed our attorney to resist it.

Q. But you were resisting it until about the 20th or 22nd of May; was that correct?

A. Well, I don't know when my resistance ceased; that account was signed on the 27th of May. I assumed that they agreed to the composition on that date and ceased our opposition. I had some agreement with Mr. Smith in reference to that—to our ceasing to object to the composition. I could not tell the conversation after such a lapse of time, but we acceded to the composition and Mr. Smith was to buy our claim and our collateral, particularly this statement that they were anxious to get—this financial statement.

Q. And was the agreement that you were to give anything in addition to the 25%?

A. He agreed to pay us this money that he did pay. I don't remember whether he did at that time

(Testimony of Edwin T. Coman.)

give me a cashier's check of the Bank of Commerce to guarantee that. The record shows that we got it on the 8th of June.

Q. It was paid on that day, but isn't it a fact that some time about the 22d of May, between that and the 27th, that this [58] check was turned over to you to hold subject to this composition? Mr. Coman, isn't it a fact that prior to the time you signed that petition and consented to the composition that Mr. Smith turned over to you a cashier's check of the Bank of Commerce for \$4270 some odd dollars?

A. I don't remember whether that was the way it was settled or not. There must be some record that would show. I don't think I have any record. I have all the records of the bank in reference to that. I have a copy of our ledger sheet and a copy of the account of Praeger-Schlessinger Company and a copy of the account in the liability ledger showing the amount of their indebtedness. This envelope has that collateral record. I have no notations there showing that it was turned over to us about May 21, 1912. I have no notation there showing when it was turned over; if it was turned over on that date, I don't remember. I haven't any recollection as to its being turned over prior to the time that we got our check from the trustee. It might have been and it might not have been.

Q. Did you have any written authority from the Praegers or from anyone else to turn over these papers to the Clere Clothing Company?

(Testimony of Edwin T. Coman.)

A. Well, now, if I had such written authority, it ought to be here. Its not being here leads me to think I didn't have written authority, but that was handled by our attorney—I couldn't say.

Q. Mr. Coman, isn't it a fact that at the time at which you made an agreement with Mr. Smith of the Clere Clothing Company for this additional \$4270 some odd dollars, that immediately after that your attorney withdrew from the case and that you handled it yourself subsequent to that time? Mr. Hindman withdrew from the case.

A. Subsequent to the time this payment was made?

Q. No, prior to the time that payment was made and subsequent to the time this arrangement was made with Mr. Clere for this additional \$4272. [59]

A. Well, I think that Mr. Hindman did resign from the case in a measure; Mr. Hindman had started in on one theory of the case and when we didn't instruct him to go ahead and carry out that policy, why he ceased to direct that part of the case.

Q. And you handled it yourself, isn't that a fact, from that time on?

A. I presume I handled it, but Mr. Hindman still maintained his relations as attorney for the bank.

Q. But not in this case. Isn't that a fact, that he withdrew?

A. I don't know whether—we differed as to the handling of the case and whether he severed his connection or not—

Q. I am not asking you that; you stated a while ago that this matter was handled by yourself and Mr.

(Testimony of Edwin T. Coman.)

Hindman; I am asking you if it isn't a fact that right after you agreed with Mr. Smith of the Clere Clothing Company to this composition on paying you this additional \$4272—isn't it a fact that Mr. Hindman withdrew from this case and that you handled the matter from that time on?

A. I don't know what construction to put on a resigning from the case. From whatever time we had this difference I handled most of the case. If there was any agreement in writing from the Praegers or Prager-Schlessinger, I don't remember—I don't recollect because I don't find it here. If there was a writing I expect I would have it. Our only arrangement was with Mr. Smith for the Clere Clothing Company.

[Testimony of Henry R. Newton, for Trustee.]

HENRY R. NEWTON, called as a witness on behalf of the trustee, testified as follows:

I am employed by Belden & Losey who were attorneys for the Clere Clothing Company. I think we filed proof in bankruptcy for them about June, 1912. I think we represented them since that time. The first by whom I was employed represented the Clere Clothing Company, I think, in all matters in which they had any business in Spokane. [60]

Q. As such representative you acted as one of the trustees did you not, of the Praeger-Schlessinger Company?

A. No, sir, I did not. I didn't act as a representative of the Clere Clothing Company. I was secretary of the Praeger-Schlessinger Company after the 12th

(Testimony of Henry R. Newton.)

of May, 1912,—I think it was the 12th of May. I turned over all records to the Union Trust & Savings Bank, the Trustee in Bankruptcy. I haven't any of the minutes; I turned over all minutes that I had to the Union Trust & Savings Bank. As to whether or not there were any other minutes than those turned over, I will say I am not sure what was turned over, but I turned over all I had. There were some minutes of the Praeger-Schlessinger Company that were turned over to Louis Schlessinger. He came up to the office and wanted to borrow them a few days before he applied to the Superior Court for a Receiver, and he asked to borrow them to look at them, and those were not returned and I don't know what became of them. At the time I was appointed secretary of the Praeger-Schlessinger Company, one certificate of stock was issued to me. It may have been July 3d, 1912, that I was appointed, instead of May, and from that time up to the time of the bankruptcy proceedings, I acted as secretary of the Praeger-Schlessinger Company. Louis Schlessinger held one share and T. H. Clere held the balance. Mr. Clere is a gentleman residing at Syracuse, New York, also President of the Clere Clothing Company as I am informed, and he represented himself to be the President of the Clere Clothing Company. Mr. Clere was present at the meetings of the Praeger-Schlessinger Company held subsequent to July, 1912, and voted all the stock he had at the stockholders' meeting that was outstanding in his name—I think 498 shares. The certificate of stock that stood in my

(Testimony of Henry R. Newton.)

name didn't belong to the Clere Clothing Company; it belonged to the former stockholders L. Praeger and S. S. Praeger and Clara Praeger and that bunch.

[61] It was a fact that the former stockholders surrendered up their stock and the stock was cancelled and it was re-issued to myself and Mr. Clere and Mr. Schlessinger. Schlessinger had one share and it was surrendered up under an agreement by which we held it in trust for these former stockholders; the agreement was oral. We had no written agreement.

Q. At the time of the meeting of the stockholders in July, 1913, in which there was a resolution passed to put the Praeger-Schlessinger Company in bankruptcy, isn't it a fact that Mr. Schlessinger wasn't present and Mr. Clere and yourself voted a resolution?

A. There were two meetings, Mr. Witherspoon, in July; at one meeting Mr. Schlessinger wasn't present and at the other meeting he was present.

Q. I am asking you if it isn't true that at the meeting of the stockholders in July, 1913, that resolution was passed to file a petition in bankruptcy, at which Mr. Schlessinger wasn't present?

A. Well, if you will show me the meeting and give me the date of it, I can tell you possibly.

Q. I hand you what purports to be the minutes of the meeting. (Handing same to witness.)

A. Apparently Mr. Schlessinger wasn't present at that meeting. I didn't represent the Clere Clothing Company at the time of the settlement of the composition; Belden & Losey and myself did. At the time

(Testimony of Henry R. Newton.)

the stock was turned over to me I didn't know whether or not there was any moneys put in the business; actual cash moneys put in the Praeger-Schlessinger Company's business, and so far as I know there was no subscription list issued at that time. As to whether or not there were any moneys put in the business of any kind, character or description, from the time of the composition in bankruptcy up to and including July 23, 1913, other than from the sale of merchandise, I couldn't say. I was secretary, but I didn't have anything to do with the [62] active management of the store. The only times I had anything to do with it was at the meetings of the stockholders or the trustees. I didn't know anything about the books of the company; that is, anything except the stock book and the minutes—that is all I kept, the rest of them were kept by Mr. Schlessinger. I know they kept a set of books, but I didn't know anything about the ledger, cash-book or journal of the company. I think I could identify the books if I saw them. That is apparently one of the books that was kept by the Praeger-Schlessinger Company. The only one I have seen very much of is the ledger. I believe that is the ledger and those are the cash-books. Those books look though they might be the books of the company. They have the names of certain people with whom Praeger-Schlessinger did business, and look like they might be their books. I think that is the ledger; I am sure of it. I couldn't say whether or not I still have my share of stock in the Praeger-Schlessinger Company. It seems to me that all that

(Testimony of Henry R. Newton.)

stock was turned over to the Trustee in Bankruptcy; I am not sure. I think all the stock was turned over to the Trustee in Bankruptcy—I wouldn't be absolutely sure of it,—I mean to the Union Trust & Savings Bank. Some young fellow came up there with an order from the bank to deliver it to him. I think his name was Smith, and I turned over to him certificates 1 to 20, all the stock amounting to 500 shares of the stock of the Praeger-Schlessinger Company. Apparently there were no other certificates. Apparently it is a fact that these certificates that were issued July 3, 1912, were certificates 21, 22 and 23, and I believe it is correct that those were not turned over. I don't know whether I have the certificates in my possession. I was under the impression that I turned them over. They may be up in the office. I don't think that I have the certificates standing in the name of Clere in my possession. I don't know whether [63] Belden & Losey have them or not. I don't think that they have though. I think that Clere had the certificates standing in his name. Mr. Clere was out here twice or three times possibly, after he was appointed an officer or director of the Praeger-Schlessinger Company. I say he was out here in July, 1912. I think he was not out here in December, 1912. He was here the 25th of January, 1913, I know. He was out here just about the time this last petition in bankruptcy was filed. I think that is all the times he was here. He attended at all times when he was here when the meetings of the Praeger-Schlessinger Company were held, and voted.

(Testimony of Henry R. Newton.)

Cross-examination.

The minutes of the meeting of January 25th, 1913, were turned over to Louis Schlessinger. He came up to the office a day or two before the suit was filed in the Superior Court appointing a Receiver, and he said he wanted to look at them. At that time I supposed he just wanted to look at them, so I loaned them to him and that is the last I ever saw of them. Mr. Schlessinger, Mr. Clere, myself and Mr. Belden were present at that meeting of January 25th. At that meeting the Praeger-Schlessinger Company presented to the meeting an invoice and inventory of all merchandise in the Praeger-Schlessinger Company's place of business, including an invoice of merchandise belonging to the Clere Clothing Company held by them on consignment. Mr. Schlessinger said he wanted to show the—Mr. Witherspoon called attention to the meeting of July 8th, 1913, at which Mr. Schlessinger wasn't present, a meeting held by myself and Mr. Clere at which a resolution was offered that the corporation was insolvent,—yes, that the corporation was insolvent. At a subsequent meeting held on the 30th day of July, 1913, at which Mr. Clere, Mr. Schlessinger and myself were all present, a resolution was adopted, substantially [64] the same as the resolution adopted on the 8th of July, and the proceedings on the 8th day of July were ratified and approved by the entire Board of Trustees. (Minutes referred to marked "Trustee's Exhibit 16.")

[Testimony of Richard W. Nuzum, for Trustee.]

RICHARD W. NUZUM, called as a witness by the Trustee, testified as follows:

I am a practicing attorney at Spokane, of the firm of Nuzum, Clark & Nuzum. I am acquainted with T. H. Clere of the Clere Clothing Company. On or about June or July, 1913, I had a conversation with Mr. Clere in reference to the Clere Clothing Company's interest in the Praeger-Schlessinger Company, when he was here in the summer at the time the Praeger-Schlessinger suit was commenced in the Superior Court and the receiver was appointed; whether it was June or July I couldn't say; that was the only time I had conversations with him at that time. The principal conversation related to the one I remember most about was in Mr. Belden's office, to see if we couldn't get together on some settlement. Schlessinger had said that Clere wanted to meet me with him, and when I went up there Clere asked what I was there for. Mr. Belden was in the room and I told him what Schlessinger had said and we went on—I think I had Schlessinger make a statement of what he contended was due the Clere Clothing Company from Praeger-Schlessinger and from that we talked as to how much was involved in the indebtedness claimed and actually due. At that time I had some statements that Schlessinger had gotten up and some others. I remember one distinctly, in Schlessinger's own writing, that I read from. The statement you hand me here don't appear to be marked anything. I had that. Better have it marked so

(Testimony of Richard W. Nuzum.)

that it can be identified. I had this one in my possession—my recollection [65] is I had all of these, but whether I read all of them to Clere, I wouldn't say—I know one of them I did, the first one. I said I knew that I read from this and I had all these others in my possession. The transaction we were entering into particularly was the amount of money and merchandise that really went into that note, Schlessinger claiming that the note was for an amount largely in excess of the real consideration. I interrogated Mr. Clere with reference to this sheet No. 4 with reference to the amount shown there as the amount of the inventory. Clere had claimed in that conversation or one other in which he was down in my office, that the note represented the amount of the inventory. The note was for thirty thousand and some odd dollars. The amount of the inventory is given there, and as I remember from the inventory it was more—\$27,000 and something. The amount of the inventory was \$27,254.40 as I stated it to Clere and I had this other at that time because Clere laughed at 33 1/3 % being thrown off. I said to Clere, "How do you reconcile the fact that you claim you gave this note for the amount of the stock on hand when the inventory is only \$27,000, and the note is thirty thousand some hundred." He said a man could give anything he wanted for a stock of goods, words in substance to that effect. That was the answer he gave me. That conversation was in Belden's office. There was present Mr. Schlessinger, Mr. Belden and myself and Clere. He did not state that

(Testimony of Richard W. Nuzum.)

the total inventory wasn't \$27,000 or that it was in excess of it. The only time I ever heard that the inventory was any different from that, was in Mr. Clere's testimony in Syracuse when I took his deposition. The inventory was in my office and I have seen it. I thought it was given to Schlessinger—I know it was given to Schlessinger after they got through with the Superior Court case. Belden & Losey asked me for it. I didn't give it to Schlessinger but I know it was given to Schlessinger by the office. I know Schlessinger took it. I didn't add up [66] the inventory, but \$27,254.40 was the amount that the footing showed, and Mr. Schlessinger made that statement. That was the total inventory of the stock.

(Said papers were marked Trustee's Exhibits 17 and 18 for identification.)

Q. Referring to Trustee's Exhibit No. 17 for identification, I will ask you to state if you talked to Mr. Clere with reference to that note,—the \$30,000 note which they had and which Mr. Clere stated that was made up of the items that they had paid out in the former bankruptcy proceedings including the payments to the Exchange National Bank, etc.

A. Well, I read from this list here. I had this same paper and said to him that Schlessinger claimed that these were the amounts going into that note; the only amount that he disputed was Belden & Losey, \$250.00, Belden claiming he never had gotten that, and assured me and Clere and everybody else that this fee was or would be more than that in the

(Testimony of Richard W. Nuzum.)

matter, and claiming that he never had paid him that, and they laughed about that a good deal; then Clere spoke up and said, "Yes, I think Smith's amount was \$1,890." He said, "I suppose Smith was here about 6 weeks and he ought to give that back." I said, "Mr. Clere, I am not going into the reasonableness or unreasonableness of this business." He said, the Belden and Losey account was incorrect; that was the only one he corrected. I don't think at that time he said anything as to the creditors in the original bankruptcy proceedings paying over to the Clere Clothing Company a certain amount. I had a conversation with Mr. Smith in reference to the matter. After taking the deposition at Syracuse I said to Mr. Smith, "What became of this money that Mrs. Praeger and Crystal and a number of the creditors who were allowed money?" I said, "That was turned back." He said, "That was applied on the note; that Clere knew nothing about that; that he, Smith, was out here and turned it into the Bank of Commerce on the note that was given to raise money to make a composition. Smith was the [67] attorney for the company, and the secretary.

Q. Did you know what the amount was? Did he state the amount, or do you remember it?

A. I don't remember the amount, but there was Mrs. Praeger's and there was Crystal's and there was the one that Frank Allen represented, a woman by the name of Manley. I would not be sure about McDowell; it was the preferred creditors that were

(Testimony of Richard W. Nuzum.)

given this money. The checks would show very plainly. The receivership had the checks; they were all turned in. As I understood, originally, the checks were turned into the bank, and they ought to show the bank's endorsement. I don't remember having had a conversation with Mr. Clere or Mr. Smith on behalf of the Clere Clothing Company with reference to the payment of \$4,272.20 to the Exchange National Bank. I only saw Smith in Syracuse. I don't remember whether we spoke about the Exchange Bank matter. With Clere, I did, as to the \$4,272.20 paid. Now, at one conversation—whether it was in Belden & Losey's office, or in our office—the suggestion was made either by Mr. Smith or Mr. Clere; Losey was in our office; I don't think Mr. Belden was down in our office at that time. He was in his office and Losey came in part of the time. As to how this money was to be paid, now somebody said, either Losey or Clere, that—they were both there—talking about the matter; I don't know which one did the talking; they were in the room talking about it.

Q. How did Mr. Losey happen to be in the room and talking about it?

A. Talking for the Clere Clothing Company the litigation was against. Well, they were appearing for the defendants in the case that Praeger and his wife had brought for damages. I don't remember whether it was against the Clere Clothing Company or against Clere. I don't remember which one it was, but Clere was there with Losey. On the ques-

(Testimony of Richard W. Nuzum.)

tion of how this \$4,272, came to be paid to the Exchange Bank, I claiming it as a preference which they had no right to pay. Now, one of the others said—I can't [68] give the exact words—that in consideration of that or for that money, certain papers were relinquished by the bank, that would have incriminated Mr. Praeger. I said, "Do you imagine that the bank or Mr. Coman or anybody else is going to admit or claim that they gave up papers that would send a man to the penitentiary and compounded a felony for \$4,272, or any other sum? They can't and won't take that position." That is all they said about it. I don't know whether or not that paper that you referred to or that you say they referred to was a financial statement of Praeger's or the Praeger-Schlessinger. I judged that it was the statements—sworn statements that old man Praeger had given to the bank to get credit; that is what I thought they meant; and that to get those, the bank had been given money to turn over to them. They didn't say what papers.

Q. You say "they." Whom do you refer to?

A. Well, whoever gave the money to the bank.

Q. Who made that statement; myself or Mr. Clere?

A. I said it was in my office. You were not in the office at that time. I couldn't say whether it was Mr. Losey or Mr. Clere that made that statement; it was either he or Mr. Clere; it was a conversation in which everybody was taking part. The reason that I remember it so distinctly was that anybody should take the position that the bank or any-

(Testimony of Richard W. Nuzum.)

one else would admit that they had given papers up for money to compound a felony, which it would have been if they had taken that position. I read all the items in Trustee's Exhibit No. 17 to Mr. Clere. I read to him the items showing merchandise from April 17th to May 28th, 1912—\$21,257.90. The only item he disputed was the Belden & Losey item of \$250.00 and both he and Mr. Belden said that wasn't correct, and Mr. Schlessinger said to Mr. Clere, "I took this from the slip that you had. Have you got the slip now?" and Mr. Clere said he hadn't the slip, but if you will remember I examined him about [69] the slip in Syracuse, New York; he admitted that the slip that he had was practically the same except the Belden & Losey money. As I said, he didn't dispute any of them except the Belden & Losey item. As for him giving a categorical answer saying, "Yes, that is correct, and this is correct," he didn't do that. The only one he raised objection to was on the Belden & Losey item and he made a comment on the Smith item, sort of sarcastically, saying, "Of course, he being away from his office six weeks, he isn't entitled to anything, and he ought to turn the money back." Mr. Clere didn't make any comment on the invoice of \$27,250.40. His answer to me was when I asked him, "How did it come when they gave you a note for thirty thousand some odd dollars and the invoice is only for that amount (indicating), how do you reconcile that?" His answer was, "You could give as much as you wanted to for a stock of goods." There never was any question

(Testimony of Richard W. Nuzum.)

about that inventory until in his testimony in Syracuse he swore that the inventory was the exact amount of the note and the items that the Clere Clothing Company had paid out including the money to the Exchange Bank and their expenses and the money that they had shipped and the money to pay the Praeger-Schlessinger Company also, were the exact amount of the note. That was his testimony at that time. He stated that under oath, sir, and if the testimony is correctly transcribed, it is there. I read to Mr. Clere the item where it says, amount of Clere claim in full. He got the other fellows' claims settled on the basis of 25 cents on the dollar, and in this note \$4,736 was added to it in order to get Clere his money in full. In other words, while apparently he took the composition, he didn't take it. This \$4,736 was included in the \$30,000 odd dollars and Mr. Clere told me it was included in the note at maturity. He didn't dispute it. I didn't have any other conversations or talk with Mr. Clere or Mr. [70] Smith on the subject of this controversy that I have been testifying about, more than I think I have talked to them; just simply told them that Praeger and wife had told me to dismiss the case. That is, Clere, not Smith. I never saw Smith until in Syracuse. If Smith was here in July when the trouble was on, I didn't see him. I met him in Syracuse on the 12th of January. I was introduced to him by Mr. Clere in the office of the Commissioner where the depositions were taken. That is the first time I had ever seen Smith. I have no recollection

(Testimony of Richard W. Nuzum.)

of having had any conversations with Clere in reference to the Clere Clothing Company running this business of the Praeger-Schlessinger Company. It seems to me that was in the deposition. I don't think there was any conversation on that, but I examined about that; but I would not have any recollection of any conversation; any distinct recollection. As to conversations with Mr. Clere in reference to the Praeger-Schlessinger Company making payments on the notes of the Clere Clothing Company at the Bank of Commerce, I am with that like I am with the other. That question came up but whether it was when I took the deposition or whether it was a conversation, I wouldn't declare. I know there were payments made by the Praeger-Schlessinger Company on that note. I don't know whether I talked with Clere about that or whether in his testimony something was said about that. It seems to me there was either one or the other.

(Said papers were marked respectively "Trustee's Exhibits 17 and 18.")

Cross-examination.

At the time I had this conversation in the office of Belden & Losey I came up there with Schlessinger; I was attorney for Schlessinger as well as for the Pragers, the old gentleman and lady. I was attorney for S. S. Praeger and Clara Praeger, [71] his wife. My recollection is that I brought suit in the Superior Court of Spokane County to recover the sum of about \$15,000 for stock which they claimed was held in trust by Clere for them, but the papers

(Testimony of Richard W. Nuzum.)

in the case would be the best evidence. I filed papers in the Superior Court. I wouldn't be sure about whether that suit was not dismissed with prejudice out of court before I filed my complaint. There was one case in which White was appointed receiver. The other case; Mr. Belden has a copy of that case that we served on Clere, and for me to state the contents of that complaint or the object of that suit without looking at it, I wouldn't want to do. There was a receiver appointed in the Superior Court for the Praeger-Schlessinger Company; I would not be sure in which suit he was appointed, but the one in which Johnny White was appointed receiver. I think it is the case where S. S. Praeger and Clara Praeger are plaintiffs; that is my recollection.

Q. I will ask you if it isn't a fact that in that suit in which S. S. Praeger and Clara Praeger were plaintiffs and the Praeger-Schlessinger Company were defendants, that the defendant paid you an attorney's fee of \$100.00 out of the assets of the corporation?

A. I did get \$100.00 but I couldn't tell you where it came from. We got \$100.00 from this transaction. I told you I went up there to talk with these men to settle this lawsuit. The object of the suit, if you will read the papers, is to protect it from paying your notes and prevent it from being wrecked as you subsequently proceeded to do. You were paid up, so Mr. Belden told me; got your claims at 100 cents on the dollar and put it in the bank.

(Testimony of Richard W. Nuzum.)

That is in answer to your insinuation we were trying to wreck it, when the truth is you are the men who subsequently did wreck it. I don't know where that money came from. I know there was \$100.00 paid us and if it came from the [72] Praegers-Schlessinger Company, it will show on the books. Louis Schlessinger turned over to us the inventory—I don't remember the date—but he turned over the inventory to us which purported to be in the inventory taken about the time this note was executed. When we got the inventory it was just the same size that it was when it left us. I couldn't tell you how big that was. There were a good many sheets to it. I wouldn't say whether it was about 50 or 60 sheets or not. No judgment about that. It was a good sized inventory, such as you would expect where there was a stock consisting of lots of items; quite a volume of stock. It was an inventory that purported to show all the stock. I didn't examine the inventory in detail. I saw the footing of it. The total footing showed this \$27,000 because Praeger that off of it in making this statement so that he could talk to Clere. I don't remember how much merchandise the inventory showed that the Clere Clothing Company had there. I wanted to get the total inventory to show the amount of the note. I understood that this was all the merchandise of the Clere Clothing Company, because they claimed this note was the note for it. I couldn't tell you what the inventory showed. I know that it totaled \$27,540.90. Schlessinger got up some memoranda

(Testimony of Richard W. Nuzum.)

so that we could talk to Clere. That wasn't part of the inventory. The inventory showed lots of merchandise. I didn't go through it; I don't remember that it separated the fixtures from the merchandise. I hardly think that it showed other merchandise belonging in the Praeger-Schlessinger store besides what belonged to the Clere Clothing Company. He may have had that segregated, or he may have had it in these further sheets. As I told you, I didn't read it through or check it through carefully. What I wanted to get was the amount of the inventory. I couldn't tell whether this inventory showed the merchandise belonging to anybody else besides the Clere Clothing Company; I didn't check it through [73] page for page. It isn't a fact that the inventory showed there was \$30,640 worth of merchandise belonging to the Clere Clothing Company. This is the amount indicated; this is the total amount \$27,254.42. When I asked Mr. Clere to say whether this included the notes, he explained, as I have already stated, that you could give a note for anything you wanted to. I couldn't say whether or not that inventory showed that there was between five and six thousand dollars in the store belonging to other parties than the Clere Clothing Company and that was segregated from the Clere Clothing Company's stock. The inventory purported to show what merchandise these men took for that note. That is why it was taken. It was taken at the time the note was given. It was taken for the purpose of arriving at the amount of the note; that is apparently. It amounted

(Testimony of Richard W. Nuzum.)

to \$27,000 and something and the note, instead of being given for that amount, was given for the exact amount of the composition money, the money paid to the Exchange National Bank, and the balance to make up the full amount of the Clere Clothing Company's claim instead of 25 cents on the dollar and their expenses and Clere's expenses. That is not what Louis Schlessinger told me; that is what Mr. Clere admitted to me in his deposition. We had the inventory some days before the case was commenced. We were talking with Praeger and Schlessinger, I don't know how long before I commenced this suit. You have got a copy of the complaint; that will show the date and the verification of it. We got these papers maybe two or three weeks before this bankruptcy proceeding, and might have been a month before, because I talked with them quite a little about the details of it before I commenced this case. The inventory was given to Mr. Schlessinger. I never gave it to him; it was given to him by my brother or the young lady in the office. They took quite a few papers away when we dismissed old man Praeger's case. [74] It was given to him before the bankruptcy petition was filed because the bankruptcy proceeding was filed after we settled the litigation after we dismissed the case, and when we finished up with it we gave up his papers. We turned the inventory over to Mr. Schlessinger. I sent for old man Praeger and his wife and had them direct me in writing to dismiss the case and gave them the papers. I wasn't very

well pleased with the way the case wound up. At the time we gave this inventory to Schlessinger there was a receiver appointed for the Praeger-Schlessinger Company. I never thought about turning the inventory over to the receiver. Up to that time there never had been any dispute about the amount of the inventory. Never had been any question about the amount of the inventory and I never thought about turning it over to White or not turning it over to White.

[Stipulation Re Note and Mortgage of Clara Praeger to Praeger-Schlessinger Co., etc.]

It was here stipulated between counsel for the respective parties as follows:

It is agreed that the \$2,000.00 mortgage and note referred to in Mr. Coman's testimony the other day were the note and mortgage made by Clara Praeger to the Praeger-Schlessinger Company and the note was endorsed by the Praeger-Schlessinger Company to the Exchange National Bank as collateral security for \$2,000.00 note of February 6th, 1912, and that at the time of the filing of the claim of the Exchange National Bank in the original bankruptcy proceedings, said note and mortgage were surrendered up—it not being known who it was surrendered to; there seems to be a general mix-up from the testimony, but somebody got it—and that the Clara Praeger claim filed was reduced \$2,000.00 on account of the surrender of such note in the original bankruptcy proceedings. [75]

The claim was filed for \$9,000.00 and some odd dol-

lars and the defendant was paid on \$7,000 and some odd dollars.

(Letter from Thomas K. Smith to L. A. Schlesinger dated June 27th, 1913, offered in evidence and marked Trustee's Exhibit 19.)

[Testimony of Josiah Richards, for Trustee.]

JOSIAH RICHARDS was called as a witness by the trustee and testified as follows:

My name is Josiah Richards; my business is that of an Auditor and Accountant. I reside in Spokane and have been engaged in the auditing and accounting business a little over 5 years. (The qualification of Mr. Richards as an accountant was here admitted.) I have examined the books of the Praeger-Schlessinger Company, the bankrupt. I examined the general ledger, the journal, cash-book, check books, bank statements and the checks. The entries in these books commenced on June 3d, 1912. Answering your question as to whether or not I have examined these books to ascertain if there was any cash paid into the business from June 5th, 1912, or from the bankruptcy proceedings up to the present time, outside of moneys received from the sale of goods and merchandise, I will say I find on July 10th, 1912, an item of \$810.08 described as the Ball check and an item of \$101.00 on June 4th and an item of \$48.75 on June 4th, 1912. The item of \$101.00 is simply a cash entry; no description. Outside of these three items I don't find any other moneys put in the business of any kind, character or description from that time up to the time of the

(Testimony of Josiah Richards.)

second bankruptcy. The books were opened as of June 8, 1912, and were opened by capitalizing the merchandise at \$40,000, and capitalizing the fixtures at \$5,000 and capitalizing the accounts receivable at \$10,011.31. Those accounts receivable were old accounts receivable of the Praeger-Schlessinger Company. There was no statement in regard to what the merchandise was or any description of the furniture and [76] fixtures. There was no merchandise account open at that time in the general ledger. The merchandise account was opened, as appears from the general ledger, under date of July 27th, 1912. That shows as to merchandise, a balance of \$27,576.51 which balance is the difference between the \$40,000 at which the merchandise was capitalized on June 3d, plus merchandise purchased from June 3, to July 27th, less cash sales. The Clere Clothing Company account was opened on June 3d with a credit of \$100.00, cash payment by Clere Clothing Company to a Mr. Gilmore, and the next succeeding entry is a payment of \$14.75 to Mr. Belden, and then follows payments made by cash and by deposits in the Bank of Commerce for the credit of the Clere Clothing Company, which payments are charged to the account of the Clere Clothing Company. The Clere Clothing Company is given credit for goods shipped to the Praeger-Schlessinger Company if this is the Praeger-Schlessinger Company, for which they received credit, and their account is charged with sundry payments made on account of those goods beginning with the 5th of June and running

(Testimony of Josiah Richards.)

through July. The title of the account is the Clere Clothing Company consignment. As to what the credit side purports to show, as to when they received those goods, it purports to show that the entries were made under the dates running respectively from June 5th to July 8th, but that the goods were shipped from the Clere Clothing Company under the dates running from April 17th to June 3d to June 4th. The following were the items that were shipped during the month of April, 1912: Under date of April 18th, 1912, \$1530.00; April 20th, \$265.15; April 19th, \$1369.00; April 23d, \$824.00; April 29th, \$496.00. Those are the April consignments. In May I find the following consignments: May 20th, \$624.00; May 20th, \$887.75; May 20th, \$3,863.00; May 22, \$1,693.50; May 23, \$2,025; May 29th, \$1,299.00; May 22d, \$489.00; and May 28th, \$1,180.50. [77]

These goods were all charged in the books of the company subsequent to June 1st, but the entries show that they were shipped prior to that time. From my examination of these books, I do not find any note in the ledger or day-book or any bills payable in the ledger to the Clere Clothing Company for \$30,640.00 but there are other items and accounts in the ledger or journal other than the accounts I have referred to. With reference to the Clere Clothing Company, the Clere Clothing Company account running from August to January 3d, 1913, and another Clere Clothing Company account from February 4th to June 10th, 1913. As to your ques-

(Testimony of Josiah Richards.)

tion as to whether or not there was any change made in the books showing a change of management or change of conditions from June 1st, 1912, to June 10th, 1913, will say I find from June 3d to August 1st, that a Mr. Gilmore received a percentage of all goods sold. I find from August 1st to the closing of the books, that is the last entry in the books towards the latter part of July, 1913, that Mr. Gilmore receives no more payments on account of goods sold, nor does his name appear in the expense account, but salaries are paid to Praeger-Schlessinger. Schlessinger receives items that are charged to expense account that purport to be salary and also payments made to Praeger. The payment to Schlessinger is only a weekly payment. I can figure out what that is; \$50.00 is what it appears to be here to S. A. Schlessinger. His salary started in, I think, the first week in August—August 10th, and they continued the same up to the time in July that I testified to. That is the same amount of salary. Answering your question as to whether or not from my examination of these books I could say there was any change in the management at all or a change in the ownership of the business from the first week in August, 1912, up to July, 1913, I will say the books indicate that there was no change during the period from June 1st to the last entry in the [78] books in July, 1913; that is from June 1, 1912, the accounting entries. There was no inventory taken. There continue during the entire time. There are no closing is no record of any bills payable in the books which

(Testimony of Josiah Richards.)

would indicate a sale. Every account continues during this period without having been closed. With reference to the account of the National Bank of Commerce, will say from June 1st to July 29th, 1912, the National Bank of Commerce is charged with certain deposits made in the bank. There do not appear to have been any checks issued against that account. On July 29th, checks were issued against the bank account under the name, that is checks signed Clere Clothing Company for a few days, 4 or 5 checks and thereafter Praeger-Schlessinger Company. Both of these checks are charged against this bank account. The books show on July 29th that there was a deposit of \$1000.00 and just after that there were these four or five checks drawn for just about \$1000.00 beginning with the 2d of August. The checks signed by the Clere Clothing Company, per L. A. Schlessinger, aggregate about \$1300.00. There wasn't another \$300.00 deposit about the same time as the \$1000.00. On the date the deposit was made, the date this \$1000.00 deposit was made, that appears as the first entry in this bank account giving a balance of \$1000. There isn't another deposit of about \$300.00 and the next deposit or item is August 5th—\$195.55. The dates of the checks signed by Clere Clothing Company run from July 31st to August 12th, 1912. From my examination of the bank statements it appears that the bank account was carried in identically the same manner at all times. I find an interest account. The interest account shows from August 9th, 1912, when the

(Testimony of Josiah Richards.)

first entry was made until June 2d, 1913, that there was interest paid monthly on an indebtedness to the National Bank of Commerce. The interest indicates that the payments were made on an indebtedness of \$7,500.00 and \$2,500.00. There is no account in the book showing that the Praeger-Schlessinger [79] Company was indebted to the National Bank of Commerce. Referring to the merchandise account, the entry in the ledger account under January 25th, 1913, shows a debit balance of \$27,007.02. That is taking the merchandise at the \$40,000 that the business began with on June 3d and adding thereto all other purchases of merchandise and deducting therefrom the amount of sales of merchandise; that is the gross sales. Based on their statement that they had \$40,000 worth of merchandise on June 3d, the entry on January 25th, 1913, does not show anything in regard to an actual inventory of the merchandise, nor is there any other entry in the book that shows that the books were ever closed out. The merchandise account shows that it was an open, running account during the entire period from June 3, 1912, to July 8th, 1913. If Mr. Clere testified that the merchandise on June 3d was of the value of \$30,000, my conclusion would be that they loaded their merchandise account \$10,000 and as to the value of the goods on January 25th, 1913, my conclusion would be the same. It is all handled as one transaction during this entire period and no inventory is taken, and if they had started off with \$30,000 the balance would then be \$15,000. On the

(Testimony of Josiah Richards.)

25th of January, 1913, the concern owed other creditors than the Clere Clothing Company. I have examined the claims filed in this bankruptcy proceeding and do not find the claims as filed in this bankruptcy proceeding shown on the books that I have before me. The items in the claims are shown however. The items are shown. In reply to your question as to how many of these claims and what amount are for goods sold prior to January 25th, 1913, I find Cluett, Peabody & Company, 3 invoices from December 2d, 1912, to January 2d, 1913, aggregating \$346.30; the amount of the claim as filed was \$408.85, which includes an item sold February 28th, 1913, and those accounts were all entered on the books in the same manner. No part of them was paid. The next one, the Dagg-Dennedon Company, an item [80] of January 16th, 1913—\$271.35, H. E. M. Imas & Sons, an item of November 15th, 1912—\$143.50; that claim is filed. The Lorenz Knit Goods Company, an item of October 29th, 1912—\$180.00, the Spokane Dry Goods had a claim; had a balance but I don't find that claim filed. That is the total of the accounts he has invoiced indicate that the goods were sold prior to January 25th. Those particular invoices were unpaid and their claims filed in August, 1913, and each one of those balances is shown by a particular invoice. I got possession of some of the invoices of the Clere Clothing Company prior to January 25th, 1913. I have a number of invoices for goods subsequent to July 29th, 1912. I have checked those with the books of the company

(Testimony of Josiah Richards.)

and they check. They were all sold on open account from the Clere Clothing Company to the Clere Clothing Company at Spokane, Washington, and were sold on terms 7% November 1st. These particular items that I have here. One of these consignments ran to H. L. Gilmore & Company, care of Praeger-Schlessinger, Spokane, Washington, sold on August 8th, 1912. (It was here admitted by counsel for the Clere Clothing Company that Gilmore & Company and Clere Clothing Company were the same.) I don't find any record of any of these goods sold subsequent to the one item that you have of August 8th to Gilmore & Company; that shows that they were sold on consignment; furthermore I have an additional invoice dated February 4th, 1913, of Clere Clothing Company sold to Clere Clothing Company of Spokane, Washington, an invoice of goods \$864.50 under date of February 4th, 1913. That is the only invoice we have for 1913. The others are all 1912. There is another one attached Praeger-Schlessinger in March. (Exhibits were marked Trustees' Exhibit 20 consisting of 2 sheets and 21 consisting of 24 sheets.) As to whether from the time they started to pay interest at the Bank of Commerce up to July, 1913, that interest was paid on notes of [81] the Clere Clothing Company, will say that up to July, to the end of July, there are no records in regard to what those payments were made for to the National Bank of Commerce other than that the amounts so paid were charged to the Clere Clothing Company but from July 31st on there is a record of the inter-

(Testimony of Josiah Richards.)

est payments on exactly the same account. The interest items are charged as an expense against the business, in exactly the same method as they would be charged if the Clere Clothing Company were owning and operating the business. It would not have been proper to have made the charges they did if they did not own and operate the business. The charge would have to be made against the Clere Clothing Company or for whosever account the payment was made.

Cross-examination.

On these two sheets (indicating) I find the account of the Clere Clothing Company between June, 1912, and August, 1912. Answering your question with reference to these two sheets and asking if those pages were creased at the time I got the books and examined them, and if it appeared that the pages had been doubled up that way as they are at the present time, I will say I believe so. I haven't removed them. I find that these two pages in the ledger are the only ones which appear to be turned down; that is the only account. There is an account commencing with August 15th which isn't turned down and the account which is turned down closes with the 22d day of July. The book is in the same condition as it was when I first examined it. There is a leaf in the interest account that appears to have been folded; it doesn't appear to have been mussed; it appears to have been folded. Page 47 has been creased; that is the last page on the book. I wouldn't make a guess as to whether that was a crease made

(Testimony of Josiah Richards.)

accidentally or one made intentionally. Turning to the account [82] of Clere Clothing Company between June 5th and the 29th day of July, 1912, that account is entitled Clere Clothing Company. There are no other words added to it. Turning to the account between June 5th and July 22d, that account is sheet No. 3 entitled the Clere Clothing Company consignment. I don't think that in testifying I gave any figures as to merchandise purchased between the 3d day of June, 1912, and the first day of August, 1912—\$21,257.90 is the amount which the Clere Clothing Company consignment account, account No. 3 received credit for; goods which included invoices from April 17th to June 28th, 1912, and which are entered on those books between June 5th and July 22d, 1912. As to the question whether, supposing that Mr. Clere testified that the stock of merchandise was worth \$30.00 on June 3d, 1912, and that \$21,000 of merchandise was added between June 3d and the first day of August, 1912, that the books showed a \$40,000 stock of merchandise on August 1st, 1912, I would from that statement believe that the merchandise account had been padded. I will say that is purely a hypothetical question. The statement above isn't borne out by any entries in the books. There are no entries in the books that there was an account of \$40,000 of merchandise on August 1st; the merchandise account of August 1st shows \$27,556.71. I find no record of any checks having been issued on the bank account between June 1st and August 1st, but that between August 1st and August 8th or 10th,

(Testimony of Josiah Richards.)

I find checks signed Clere Clothing Company by Louis Schlessinger to the amount of about \$1500.00. The total amount of interest paid between the 25th day of January, 1913, and the close of the interest account was \$210.00. The records do not show that the interest was all on the note of the Clere Clothing Company. The record shows that between January 25th and June 2d, 1912, interest to the amount of \$210.34 was paid to the National Bank of Commerce and charged to interest account. I testified that between June 3d, 1912, and [83] August 1st, 1912, the books show that Mr. Gilmore received a percentage on all sales and that after the first of August, 1912, Mr. Gilmore's name does not appear in the books. After the first of August, 1912, a salary account was started and salaries were paid to Louis Schlessinger, S. S. Praeger and sundry clerks; to M. M. Levine and Leon Lemon, who were presumably clerks. After January 25th, 1913, the only invoice I have are one of February 4th, sold to Clere Clothing Company and one of March 12th, sold to Praeger-Schlessinger Company; the Clere Clothing Company received credit for both invoices. (The books were marked respectively "Trustee's Exhibits 22, 23, 24, 25 and 26.) (The trustee here rested his case.)

And thereupon counsel for the Clere Clothing Company moved that the objections of the trustee be dismissed and that the claim of the Clere Clothing Company be allowed in full. The motion was denied by the referee and thereupon the claimant, the Clere Clothing Company, to maintain the issues

(Testimony of Josiah Richards.)

on its part, introduced the following evidence, to wit:

The Articles of Incorporation of the Praeger-Schlessinger Company were offered in evidence and marked "Creditor's Exhibit No. 27." A copy of the complaint in the suit of L. Praeger and Clara Praeger, his wife, against T. H. Clere, was offered in evidence and marked "Creditor's Exhibit No. 28."

[Testimony of H. R. Newton, for the Creditor.]

H. R. NEWTON was called as a witness on behalf of the creditor, Clere Clothing Company, and testified as follows:

My name is Henry R. Newton; I am secretary of the Praeger-Schlessinger Company; I have been secretary of the Praeger-Schlessinger Company since about the middle of January, 1912, and was present at the meeting of the Praeger-Schlessinger Company held at the office of Belden & Losey, 1208 Old National Bank [84] Building on or about the 25th day of January, 1913. There were records made of that meeting, which were in my possession until about the time Mr. Nuzum brought this suit, along about the first of May or June, just shortly before the bankruptcy proceedings were filed, when Mr. Louis Schlessinger came up to the office and said he wanted to borrow the minutes of that meeting together with an inventory that I had in my possession, and stated that he would return them in a day or two. He didn't return them and after this trouble arose I demanded of Schlessinger that he return the minutes and also the inventory to me as secretary,

(Testimony of H. R. Newton.)

but he refused to do so. I have copies of the minutes of the Board of Trustees; carbon copies of the minutes of those meetings. These are the copies made at the time the originals were made. (Papers marked in evidence as "Creditor's Exhibit 29"). Those are copies of the originals which were turned over to Mr. Schlessinger after the resolution was adopted and note was executed in the presence of Mr. Schlessinger, Mr. Clere, myself and Mr. Belden and it was signed by Mr. Schlessinger as president of a corporation, and attested by me his secretary, after which it was delivered to Mr. T. H. Clere. I heard the testimony of Mr. Nuzum the other day as to this inventory having been lost. I saw the inventory. The inventory was submitted by Mr. Schlessinger at the meeting of January 25th, 1913. The inventory was about 50 or 60 pages in length, I should say, and purported to show every item of merchandise in the place of business at 111 Howard Street including both fixtures and merchandise. On the front of the inventory there was a tabulated statement segregating the items of merchandise, that is the items of clothing, men's and boy's clothing, from the items of shirts and hats and articles of that nature and then there was a separate item of fixtures. The inventory showed that there was merchandise on consignment belonging to the Clere Clothing [85] Company of \$30,640.00. The inventory also showed that there was other merchandise in the place of business amounting to somewhere between \$4,000.00 and \$6,000.00; I would not care to

(Testimony of H. R. Newton.)

give the exact figures. That there was other merchandise in the place of business belong to the Praeger-Schlessinger Company which had been purchased from other parties, but this \$30,640.00 just represented clothing and some old hats, shoes and old merchandise which was in the original Praeger-Schlessinger store, which had been added while Gilmore and Company was in charge. It also included the fixtures. As to whether or not it included some bills receivable, I think bills receivable and fixtures were lumped. I think they threw in the bills receivable and clothing item was the big item. Men's and boy's clothing, as I remember, was somewhere between \$26,000.00 and \$28,000.00. I would not attempt to give the exact figures, but the clothing item alone was between \$26,000.00 and \$28,000.00. (Creditor's Exhibit No. 30 being bill of sale was admitted in evidence.) As to how the stock in the corporation was held, under what arrangements, I will say at the time this stock was turned over, that was along about in July, Mr. Clere was here in Spokane and at that time arrangements were made for the consigning of this stock to the Praeger-Schlessinger Company. Louis Schlessinger wanted to take the stock over and reorganize the Praeger-Schlessinger Company. Mr. Clere stated he was willing to consign the stock of merchandise to him but he wanted to have something to say about putting him out of the place for the benefit of creditors in case he turned out not to be honest. Schlessinger finally stated that he would turn over the stock certificate to him so

(Testimony of H. R. Newton.)

that he could control the election of a manager if Clere would agree that when the stock of consigned merchandise was disposed of that he, Clere, would turn the certificate back to the original owner. And that was the agreement, that as soon as this consigned stock was disposed of that Clere and myself were [86] to surrender our stock and that the certificates were to be reissued to the original stockholders, who were L. Praeger, S. S. P. Praeger, Clara Praeger and three or four more of the Praegers; I don't know who all they were. The purpose was to keep Louis Schlessinger honest. That was the supposed purpose.

Cross-examination.

I say that the stock was to be held by Clere and myself to keep Schlessinger honest. I didn't have any interest in it. I was holding the stock because the law requires three trustees, I understood, and I was put in to hold one share to make a trustee for the purpose of seeing that Schlessinger was honest; that is he wasn't to run away with the stock of consigned merchandise. Clere had about forty or fifty dollars worth of merchandise that he was turning over to him and Clere was to be three thousand miles away from him, and Clere wanted it fixed so that in case Louis—the Clere Clothing Company had the stock of merchandise here and he was going to turn it over on the first of August and Clere was three thousand miles away. He said he wanted it fixed so that if Louis Schlessinger was to become dishonest and wasn't operating the business correctly

(Testimony of H. R. Newton.)

or on honest principals, then without any formality that Schlessinger could be deposed as manager and the interest of creditors and the interest of the Clere Clothing Company could be protected. There were no other creditors on July 22d, at the time this stock was issued, outside of Clere Clothing Company creditors. It was to protect all creditors until the consigned goods were turned over and disposed of; then we were to surrender our stock into the treasury and new stock was to be issued to the new stockholders. At the time the consignment was disposed of in January—this wasn't done because at that time [87] we took a note for \$30,640.00. That was a sale and as to whether or not the consignment was disposed of at that time, will say the understanding wasn't necessarily—I couldn't tell you the exact language but the understanding was that this stock of merchandise was to be protected and I don't know why it wasn't—why the stock wasn't surrendered at that time, but I suppose it was that they figured that this note was unpaid and there was still reason for keeping Louis Schlessinger honest. There was nothing said as to my holding that stock until the Clere Clothing Company was paid out in full and then after that not caring what happened to the stock. The understanding was that I would surrender my stock when Mr. Clere said so. Mr. Clere was representing the Clere Clothing Company. I would not say whether it was taken in his name for the benefit of the Clere Clothing Company or not. It was their goods that was consigned. Mr. Clere had no claim against them and the purpose was to

(Testimony of H. R. Newton.)

protect the Clere Clothing Company and that was why the stock was issued to me. Belden & Losey and myself were representing the Clere Clothing Company. They represented them in the bankruptcy hearing and prior to the composition. I didn't talk with Clere at all on the first bankruptcy; I talked with Smith I think. The first time I ever saw Mr. Clere was when he came out about the middle of July, 1912. That was about the time Gilmore was ready to close his sale up in the Realty building. Clere insisted at that time that Belden & Losey were representing the Clere Clothing Company and I was with Belden and Losey. I haven't a statement of the items showing the moneys that were paid by the Clere Clothing Company out here or the items of the Clere Clothing Company was in out here in the Praeger-Schlessinger Company. I didn't handle them; Mr. Smith handled them. I didn't know what statement Mr. Nuzum referred to in his testimony the other day. With reference to the above items [88] showing Thirty Thousand some odd dollars that the Clere Clothing Company claim to be in out here I never had any such statements; I never saw such a statement as referred to by Mr. Nuzum. Mr. Clere was terribly mistaken when he testified I had such a statement. I haven't got it. Referring to Creditor's Exhibit No. 29, that is the stockholders and trustees meeting. I think Clere got out here on the 22d or 23d of January, a few days before that meeting. This meeting was held on the 25th and at that meeting we passed a resolu-

(Testimony of H. R. Newton.)

tion as purported to be shown in that exhibit, and at that time I think the note was given. There were no other papers or agreements of any kind passed at that time of writing; none whatever, and none passed subsequent to that time. Answering your question as to how I reconciled this inventory that I stated was \$27,000.00 plus \$46,000.00 for goods bought from the outside with the books of the company which show that actually on that day they had not got over \$25,000.00 worth of goods including the \$10,000.00 increase that Mr. Clere said was above what goods were worth, will say one way of accounting for it is that the merchandise account doesn't show the fixture account in the first place. I said that the inventory showed \$26,000.00 or \$27,000.00 worth of goods, and that in addition to that there were some \$4,000.00 to \$6,000.00 worth of goods other than the \$26,000.00 or \$27,000.00. As to how I reconciled that with the books of the Company which show that altogether with all purchases there was but \$25,000.00 worth of goods, where they took the original item of \$40,000.00 in goods and merchandise instead of \$30,000.00 as Mr. Clere says it should have been, I will say I can reconcile it only in one way—that Louis Schlessinger was dishonest. I know of my own knowledge that Louis Schlessinger sold a bunch of merchandise to—I don't know to my own knowledge except what the party told me. I do know that Louis Schlessinger [89] said to me in the presence of Max Ehrman and others that he sold a package of merchandise to Max

(Testimony of H. R. Newton.)

Ehrman and there is no credit on the book for it. There was some six or seven thousand dollars worth sold to him that there was no credit for. I don't know when it was sold, but it was sold after January. You are asking me how I would reconcile it. I would reconcile it if a man were dishonest afterwards he would be dishonest before. That is the only way I reconcile it. Another thing the merchandise account does not show the fixtures. It showed \$26,000.00 or \$27,000.00 belonging to the Clere Clothing Company and \$4,000.00 to \$6,000.00 bought from outsiders. As to how I reconcile that with the book that show all purchases and sales and the books show a total of only \$25,000.00 when the books also show there was \$10,000.00 in water put in them in June, I will say I can't reconcile that. I never kept the ledger at all. It shows \$25,007.02. I don't know whether that represents an inventory or what it represents. It shows, or purports to show the goods sold and the goods bought from some time the first of August, 1912. As to whether if that book was correct then the inventory was wrong I don't know whether it would be—yes, if the book was correct the inventory would probably be incorrect. I don't know as to how that inventory was taken; that is what prices were put on it; I know who took it though. As to the old hats and old furnishing goods, I don't exactly mean they were exceedingly out of date, but it was merchandise that was in the stock of the old Praeger-Schlessinger Company or merchandise which was added by Clere while Gilmore

(Testimony of H. R. Newton.)

was in charge. I don't know what figure those goods were put in at except what Louis Schlessinger said.

[Testimony of E. H. Belden, for the Creditor.]

E. H. BELDEN, called as a witness on behalf of the creditor, testified as follows: [90]

Direct Examination.

My name is E. H. Belden; I was attorney for the Clere Clothing Company on the 25th day of January, 1913. I was present at the meeting of the Board of Trustees and Stockholders of the Praeger-Schlessinger Company on that date. It was held in our office. I saw an inventory of the stock of goods belonging to the Praeger-Schlessinger Company submitted to the trustees. As to what that inventory consisted of and what the figures showed, to the best of my recollection, I couldn't tell how the inventory was arrived at. There was a stock and the fixtures, possibly some bills receivable, that were totalled on the front page of the inventory, the inventory being an inventory of probably fifty or sixty pages, I should judge that amount, and there the different footings were run up and the fixtures and stock of merchandise and the other items that were to be turned over to the Praeger-Schlessinger Company were added up, and that total amounted to the amount named in the note. I prepared the note myself; had the inventory before me at the time the note was drawn and I remember distinctly of writing the note, having reference to the inventory to get the exact amount written in the note. I can't

(Testimony of E. H. Belden.)

tell at this time what the exact figures I saw at the end of the inventory were. I don't know now the amount of stock of merchandise, or how much was figured in for fixtures or bills receivable or what other items went in, only in a general way, and my recollection is that the stock was something like twenty-six or twenty-seven thousand dollars, but I wouldn't undertake to say; just an impression from the fact that the figures—my recollection is—figured in at about four thousand, something like that and then some bills receivable. I would not undertake to say positively though, what the figures were, but I do know that the total inventory as shown by that inventory was [91] the same amount exactly as the note, because when I wrote the note I had the inventory before me and wrote the note from the figures before me on the inventory. I was present at a conversation between Louis Schlessinger and T. H. Clere and myself along in July, 1912, at the time this transfer of the stock certificates was discussed. I had a number of conversations; the arrangement as I remember it, was this: That the stock was held by Clere as Trustee. I know old man Praeger, I think it was, hesitated somewhat about turning over his stock. He insisted upon a writing at first. I told him I wouldn't give him a writing and finally Louis Schlessinger prevailed upon him to turn it over upon a verbal agreement. I didn't want to give him a writing, because I didn't want him to get any the best of it, and I told him he would have to take Clere's word for it entirely. The stock

(Testimony of E. H. Belden.)

was held by Mr. Newton, one share, to act as trustee only. I was present when Louis Schlessinger came for the inventory and the resolution, and gave this inventory to Louis Schlessinger myself prior to the bankruptcy proceeding. I think I gave him the inventory, but didn't give him the minutes; I think Mr. Newton had the minutes. The inventory had been in my office a long time, until just a short time before this last suit was made by Mr. Nuzum. It was just prior to the filing of the petition in bankruptcy. The inventory was delivered then to Louis Schlessinger. I never did see the inventory after it was delivered to him.

Cross-examination.

In speaking of the figures in the inventory, I mean only the total. I didn't take the inventory. Nobody took it in my office. Mr. Schlessinger came into the office at the meeting that evening. Mr. Clere had, I think, staid over a day so as to enable them to finish the inventory and they had worked on the inventory [92] and completed it. I don't know whether Mr. Clere worked on it or not. It isn't hearsay with me; I know of their working on the inventory from what the two of them said. I don't know what price that inventory was taken at and cost they put on the goods, only what they told me. I don't know how much water was in it. I don't know how much freight was added to it; I don't know whether the expense of running the business was added to it. I left that to Mr. Clere. I don't know as to whether there was any deprecia-

(Testimony of E. H. Belden.)

tion put on the fixtures. I know something about it. I took the total of the total items on the first sheet of the inventory. It wasn't the sheet that had been offered in evidence here at all; on the first sheet were the totals, it was divided up so much merchandise, so much fixtures, and my recollection is that there were some bills receivable but I would not be sure as to that. They were all extended so much and then they were added up and they agreed that it was the amount of the inventory, and from that total I wrote the note which is filed here, which is in my own writing. I judge that they didn't include cash in the bank; I don't know. I don't have any distinct recollection as to that. My recollection is that there wasn't any goodwill included in it; I couldn't say that there wasn't and I am quite sure that there wasn't. It didn't include any credit for Ball of this Eight Hundred Ten Dollars that you received. There was nothing of that kind. It wasn't a part of the inventory. I did not at that time have a statement showing the moneys advanced by Clere in this former composition in bankruptcy, the moneys paid by Clere to the Exchange National Bank and moneys received by the different creditors. I was the attorney for the Clere Clothing Company at the time that the stock was turned over to Mr. Clere. As to whether the stock was turned over to Mr. Clere for the Clere Clothing Company for the benefit of the Clere Clothing Company, will say it was turned over to Clere as a protection for the Clere Clothing Company. Mr. Clere at that time

(Testimony of E. H. Belden.)

was presumed to be representing [93] the Clere Clothing Company. I assume that Mr. Clere did not have any interest himself in the claim of the Clere Clothing Company or in the Praeger-Schlessinger Company's business; that he did not personally have any interest in the proposition other than as the President of the Clere Clothing Company—not that I know of. As far as I know he was at all times acting as an officer of the Clere Clothing Company in all our dealings here with him in his Praeger-Schlessinger matter, he represented that he was President of the Clere Clothing Company. He didn't say that he was acting on their behalf in these matters that I have testified about but I presume that was the case, and Mr. Newton, in taking over this stock, was acting on your behalf for the Clere Clothing Company; he had no personal interest in it himself, he was a figure-head trustee in order that their claim might be secured.

Redirect Examination.

I heard Mr. Nuzum testify in regard to a conversation in our office with Mr. Clere in which he stated that Mr. Clere admitted that this Thirty Thousand Six Hundred Forty Dollar note was made up of the items set forth in that schedule. If there was such a conversation I didn't hear it. I was present at two or three conversations. It would be pretty hard to tell who Mr. Nuzum was representing. He had brought a couple of suits I think against Mr. Clere and the Clere Clothing Company. I didn't hear any such conversation as detailed by Mr. Nuzum.

(Testimony of E. H. Belden.)

Recross-examination.

If I was going to testify positively on the subject as to whether or not there was such a conversation as Mr. Nuzum detailed, I would say that there was no such conversation. In fact, Mr. Clere did not make any such statements as to the inventory or as [94] to how he arrived at the amount of that note, because he couldn't have said that because that wasn't the fact and Clere knew it, and I know he could not have said it. Now, in the entire conversation there was so much said there that it would be difficult for any person to detail all that was said. With reference to such a conversation as Mr. Nuzum detailed, if such a thing was said, I don't remember it, or didn't hear it, and my best recollection is that there was no such conversation; I think I could testify that such a conversation did not occur, but I would prefer not to. My best recollection is that such conversation did not occur. With reference to Exhibits 17 and 18 I wish to say I don't think I ever saw them until they were produced here, but anyway they are incorrect in one respect that I know of, and that is showing the payment to Belden and Losey of Two Hundred Fifty Dollars; I don't know where that came from, because I didn't get the money. I believe Mr. Nuzum in his testimony the other day said that I disputed that in the former conversation testified to by him. [95]

[Testimony of Leon Levy, for Claimant.]

LEON LEVY, of Syracuse, N. Y., was called as a witness on behalf of the claimant, and testified as follows:

I reside in the City of Syracuse and conduct a business as commercial adjusters and sales conductors, under the firm name of H. L. Gilmore & Company. I am acquainted with the Clere Clothing Company of this city and went to Spokane in May, 1912, on their behalf, to conduct a sale of the stock of the Prager-Schlessinger Company, arriving there May 30th, 1912. I went there under the direction of the Clere Clothing Company, to take charge of this stock which I understood the Clere Clothing Company had purchased. It was my understanding that the Clere Clothing Company got possession and title to this stock through an order of the Bankruptcy Court of the State of Washington, ordering it to be turned over by the Trustee of the Prager-Schlessinger Company to the Clere Clothing Company, and by virtue of a bill of sale executed by the Prager-Schlessinger Company to the Clere Clothing Company. This merchandise of the Prager-Schlessinger Company was consigned to the H. L. Gilmore Company as selling agents of the Clere Clothing Company, by the Clere Clothing Company, and title to said merchandise remained in the Clere Clothing Company. H. L. Gilmore & Company operated a sale in the City of Spokane, Washington, for the Clere Clothing Company. The Clere Clothing Company added stock to that then in my possession,

(Testimony of Leon Levy.)

amounting, approximately, to twenty-one or twenty-two thousand dollars. I didn't make purchases myself, of certain merchandise in Spokane, which was added to that stock during the sale, but I sanctioned the purchase. I am not sure that all of that merchandise was paid for, but when I left there I left enough money to pay everything that was owing and ordered those bills paid. I do not know the exact amount of merchandise that was purchased there; I think there was a hat bill and a few [96] hundred dollars for furnishings. Those bills were all contracted in the name of H. L. Gilmore & Company, and I deposited the moneys received from the sale in the National Bank of Commerce of Spokane, in the name of the Clere Clothing Company. All moneys received by me at that sale, over expenses, were sent to the Clere Clothing Company, or deposited in the National Bank of Commerce in its name. When I left Spokane, I left certain sums of money sufficient to pay all outstanding local bills in the hands of Louis Schlessinger, or, rather, in the Bank, with a request to him to check out all sums of money to pay the local bills. He was a member of the corporation of Prager-Schlessinger Company. I was instructed by the Clere Clothing Company to turn over the stock of merchandise and fixtures which remained after the sale, to Prager-Schlessinger, and pursuant to those instructions, I did turn over the remainder of that stock of merchandise, furniture and fixtures and accounts, to the Prager-Schlessinger Company, with eleven or twelve hun-

(Testimony of Leon Levy.)

dred dollars left over to pay local bills with. I simply turned it over as Mr. Clere told me to. My understanding was, it was consigned as selling agents to the Prager-Schlessinger Company. I did not give to the Prager-Schlessinger Company, in behalf of the Clere Clothing Company, any authority beyond that of selling agent for the Clere Clothing Company. Mr. Schlessinger did not pay these local bills while I was there, out of the money left with him by me, but he informed me by letter afterwards that he had taken care of them. While I was there, there was some insurance taken out on this merchandise, which I paid for from the proceeds of the sale. Those policies were taken out in the name of the Clere Clothing Company and loss payable to the Clere Clothing Company.

Cross-examination.

I went out there to sell on a commission basis. I had [97] no interest in the stock myself, other than my commission. I made the arrangement possibly two or three weeks before I went to Spokane. I don't know whether any of the goods that were consigned to me had been shipped before I left. To the best of my memory, I commenced to receive the consigned goods two or three weeks after I got there. I got out there on the 30th of May, I think. There were goods consigned to me from April 17th prior to the time that I went. The consigned goods were put in to fill out the stock of merchandise which I had, and all used in making the sale I was conducting. We kept track of all consigned goods sold by

(Testimony of Leon Levy.)

the lot number from the inventory from the bills, but I didn't keep that money separate—it was all deposited. I didn't divide the expense, the expense was taken out of the lump sales. The profits of the merchandise went with the sales of the others. At first we made a long profit on the goods shipped by the Clere Clothing Company, after deducting the expenses. I am not able to state positively, but I don't think that a great deal of the consigned goods was sold at less than the invoice prices by me during that sale.

Redirect Examination.

I never authorized the Prager-Schlessinger Company to do anything other than to sell these goods for the account of the Clere Clothing Company. I never authorized them to contract any debts in behalf of the Clere Clothing Company. I turned over the merchandise, fixtures and accounts and the sum of money was in the Bank to the Prager-Schlessinger Company. I gave them no authority whatsoever, because I had no right to do so.

Recross-examination.

Mr. Clere was not there at the time, he was there two or three weeks before that, if I remember right. He told me to wait until I was going to close the sale, before I turned this [98] business over to the Prager-Schlessinger Company. I didn't turn it over to them to close up the business, they were going to move on Howard Street and go on with the business there. I told Louis Schlessinger, an officer of the Prager-Schlessinger Company, in active charge of

(Testimony of Leon Levy.)

its affairs, that the Prager-Schlessinger Company was to act as selling agents of the Clere Clothing Company only. I had authority to conduct the sale, and if I needed any goods, to buy them. That was about all—I did not have any general authority to act as general agent of the Clere Clothing Company.

[Testimony of Thomas H. Clere, for Claimant.]

THOMAS H. CLERE, being called as a witness by the claimant, testified as follows:

I am president of the Clere Clothing Company of Syracuse, N. Y., and have been for about twelve years. The business of the Clere Clothing Company is that of manufacturers of young men's clothing. We sell to the retail trade. The Clere Clothing Company does not operate any retail stores at all. I am acquainted with the Prager-Schlessinger Company of Spokane, Washington, and have sold clothing at wholesale to it for about a year prior to its first failure. I loaned the Prager-Schlessinger Company two thousand dollars prior to its first failure, to assist them in business. The Prager-Schlessinger Company went into bankruptcy in the year 1912—that is the first failure. At that time, the Clere Clothing Company was a creditor of the Prager-Schlessinger Company in the sum of \$6,314.69. I was acquainted with Louis Schlessinger then one of the officers of the Prager-Schlessinger Company at the time of the Bankruptcy in 1912, the first failure. He came to Syracuse at that time to see me in regard to making a composition with the creditors of the Company. I had confidence at that time in Mr. Schlessinger's hon-

(Testimony of Thomas H. Clere.)

esty. I advised the Clere Clothing Company to advance [99] sufficient money to make a composition with the creditors of the Prager-Schlessinger Company. The Clere Clothing Company, acting under my advice advanced to the Prager-Schlessinger Company the sum of \$26,247, which was used by the Prager-Schlessinger Company in effecting a composition with its creditors. The District Court of the United States for the Eastern District of Washington, on the 31st day of May, 1912, made an order by which the stock of merchandise, furniture, fixtures and accounts belonging to the Prager-Schlessinger Company was turned over to the Clere Clothing Company in bulk, and on the same day the Prager-Schlessinger Company executed a bill of sale of all its assets to the Clere Clothing Company, the consideration therefor being the sum of \$26,247, which was advanced by the Clere Clothing Company to it to perfect this composition. The Trustee of the Prager-Schlessinger Company, pursuant to said order and said bill of sale, conveyed and turned over to the Clere Clothing Company the assets of the Prager-Schlessinger Company, the estimated value of which was \$30,000. The inventory showed at cost a greater value than \$30,000, at the price they put on it, I think, \$35,000 or \$40,000 or \$50,000, but they were not worth it. A satisfactory estimate would not be over \$30,000. The merchandise that the Clere Clothing Company received was turned over to H. L. Gilmore & Company on consignment to be sold. We retained the title. H. L. Gilmore & Company operated a sale

(Testimony of Thomas H. Clere.)

for the Clere Clothing Company in the City of Spokane, and the Clere Clothing Company added stock to that turned over of the value of something over \$21,000. H. L. Gilmore & Company purchased a little stock from merchants in Spokane that I knew about. I did not give him any authority whatever to purchase any in the name of the Clere Clothing Company. The proceeds of the sales of the merchandise sold by H. L. Gilmore & Company were deposited to the credit of [100] the Clere Clothing Company in the National Bank of Commerce and they sent drafts here occasionally to Syracuse. I received all of the moneys, so far as I know, that were produced from the sale of our merchandise. On or about August 1st, I instructed H. L. Gilmore & Company to turn over the merchandise, furniture, fixtures and accounts, in their hands, belonging to the Clere Clothing Company, to the Prager-Schlessinger Company of Spokane. As president of the Clere Clothing Company, I arranged with the Prager-Schlessinger Company to act as our selling agents at Spokane, giving them no authority beyond acting as selling agents only for us, and they were to send us the money as it was sold. We retained title—left it with them on consignment. The Prager-Schlessinger Company never at any time conducted its business in the name of the Clere Clothing Company. They positively never had any authority of any name or nature to carry on the business for us. We got a little of the proceeds of the sale of the merchandise consigned by my Company to the Prager-Schlessin-

(Testimony of Thomas H. Clere.)

ger Company. I don't know what became of the rest, we never got it. We insured the stock belonging to the Clere Clothing Company in the hands of the Prager-Schlessinger Company, in the name of the Clere Clothing Company, and the Clere Clothing Company paid the insurance through Mr. Gilmore. After August 1st, when we consigned this merchandise to the Prager-Schlessinger Company as our selling agents, we shipped additional merchandise to them from time to time, charging it to ourselves, but billing the cases to them, so that we would be sure to retain title to the goods. We shipped the goods out there for our account. The aggregate amount of these shipments is approximately \$6,024.95. That was the fair and agreed value of this merchandise. The Prager-Schlessinger Company continued to sell the merchandise consigned by the Clere Clothing Company to it from about August [101] first, 1912, to some time in January, 1913,—about the twenty-fifth of January. I was in the City of Spokane on that date and had a conversation with Louis Schlessinger, who was then the president of the Prager-Schlessinger Company. He wanted to buy the stock out and out. He asked me to sell to the Prager-Schlessinger Company all of the stock of merchandise, furniture, fixtures and accounts belonging to the Clere Clothing Company, which was in the hands of the Prager-Schlessinger Company, consigned to it for sale. I asked him to take an inventory of our merchandise. I asked him the value of our merchandise, and he said he would take an in-

(Testimony of Thomas H. Clere.)

ventory. He said he did not know the exact value until he took an inventory. He took an inventory. I had nothing to do with the taking of it, but I examined the same after he had taken it. Sidney Prager and, I think, two or three other clerks in the store of Mr. Schlessinger, assisted in the taking of the inventory. The inventory showed with regard to our merchandise, that we had over \$30,640. I then agreed to sell the merchandise of the Clere Clothing Company to the Prager-Schlessinger Company for that sum. I was holding some stock of the Prager-Schlessinger Company, in trust, and was present at a meeting of the trustees of the Prager-Schlessinger Company and of the stockholders of the Prager-Schlessinger Company, held at the office of Belden & Losey, 1208 Old National Bank Building, Spokane, on the 25th of January, 1913. All of the stockholders were present at the stockholders' meeting and all the trustees were present at the trustees' meeting. Louis Schlessinger presented the inventory of the stock, merchandise, furniture and fixtures owned by the Clere Clothing Company in the possession of the Prager-Schlessinger Company at that time. That was the same inventory that I have referred to. At that meeting, I offered, on behalf of the Clere Clothing Company, to sell the merchandise, furniture and fixtures belonging to the Clere Clothing [102] Company, to the Prager-Schlessinger Company, for the sum of \$30,640, and to accept in payment therefor a note of the Prager-Schlessinger Company, due upon demand, with interest at six per cent per

(Testimony of Thomas H. Clere.)

annum from maturity. At that meeting we had a discussion of the proposition and went over it. A resolution was then offered, to the effect that the Prager-Schlessinger Company accept the offer of the Clere Clothing Company and buy said merchandise. That resolution authorized and directed the President and Secretary of the Prager-Schlessinger Company to execute the note of that corporation to the Clere Clothing Company, in the sum of \$30,640. Immediately after the meeting of the Trustees, the Stockholders had a meeting, at which all of the stock of the Prager-Schlessinger Company was represented and voted. A resolution was introduced at the meeting of the Stockholders ratifying the action of the Trustees in purchasing the stock of merchandise, furniture and fixtures and the execution of a note for that sum, and that resolution was passed unanimously. The first resolution that I mention, which was introduced by the Board of Trustees, was also unanimously passed. The minutes of this meeting were left with the Secretary of the Prager-Schlessinger Company, at Spokane, Washington. At the time that I made the offer to sell, or prior to the time that I made this offer to sell this merchandise, furniture, fixtures and stock belonging to the Clere Clothing Company, to the Prager-Schlessinger Company. I had discussed the matter with the directors of the Clere Clothing Company. Thereafter, and on the 4th day of March, 1913, they held a meeting, at which time a resolution was introduced unanimously ratifying my action in selling the mer-

(Testimony of Thomas H. Clere.)

chandise, stock, furniture, fixtures, etc., to the Prager-Schlessinger Company for its note. The Clere Clothing Company sold to the Prager-Schlessinger Company its stock [103] merchandise, furniture and fixtures, which were held by the Prager-Schlessinger Company on consignment, and the Prager-Schlessinger Company gave the Clere Clothing Company its note for \$30,640, payable on demand. Not a cent of that note has been paid and the whole amount thereof is due and owing to the Clere Clothing Company from the Prager-Schlessinger Company. After this 25th day of January, 1913, the Prager-Schlessinger Company ordered merchandise from our Company and we shipped it to the amount of \$1610.67. The price fixed in the invoices of the merchandise sold by the Clere Clothing Company to the Prager-Schlessinger Company after January 25th is the fair reasonable market value of the merchandise sold to the Prager-Schlessinger Company. No part of the amount due and owing to the Clere Clothing Company from the Prager-Schlessinger Company after the 25th day of January, 1913, has been paid, and the whole amount thereof is due and payable. Since the 25th day of January, 1913, the relation of the Clere Clothing Company with the Prager-Schlessinger Company has been that we simply sold them goods the same as we would any other concern. The relation was that of debtor and creditor and there were no other relations whatsoever. Prior to the 25th day of January, the Prager-Schlessinger Company was never indebted to the Clere Clothing

(Testimony of Thomas H. Clere.)

Company, but they held our merchandise as selling agents only. The Prager-Schlessinger Company never had any instructions of any name or nature, either oral or written, to buy any goods for our account. During the time they were selling our merchandise, they made certain payments to the National Bank of Commerce upon a note which we had given said bank. The payments that they made were proceeds of the sale of our merchandise and in making those payments they had depleted our stock by sale. These payments on the note were made by my direction. At the time of the first failure of the Prager-Schlessinger Company, when the Prager-Schlessinger Company perfected or offered its [104] composition, the Clere Clothing Company advanced \$26,247. At that time Louis Schlessinger and his father in law and mother in law and some other relatives, owned the stock of the Prager-Schlessinger Company. At that time Mr. Schlessinger stated to me that he desired to have the Prager-Schlessinger Company continue in business with himself as manager. He represented to me that if the stock of merchandise sold to my company in bulk by the Prager-Schlessinger Company was consigned by the Clere Clothing Company to the Prager-Schlessinger Company, that the Prager-Schlessinger Company might continue in business and would purchase additional merchandise from us if it was able to get out of the hole. At that time I had confidence in the business ability and integrity of Mr. Schlessinger. We were consigning to him a large amount of merchandise. I then agreed with Mr. Schlessin-

(Testimony of Thomas H. Clere.)

ger and the others that before we would do business with them at all that they must surrender all of their stock in the Prager-Schlessinger Company and that new certificates should be issued to H. W. Newton, T. H. Clere and Louis Schlessinger. It was then agreed that Mr. Newton and myself should hold that stock in trust for the former stockholders and that as soon as the consignment arrangement between the Clere Clothing Company and the Prager-Schlessinger Company was dissolved, or if the merchandise should be sold outright to the Prager-Schlessinger Company, and as soon as payments should be made in full therefor, that Mr. Newton and I would surrender our stock and that new certificates should be issued to the parties who formerly owned it. I held this stock individually—the object of the arrangement was solely for the purpose of placing the control of the interests of the Prager-Schlessinger Company in the hands of creditors, so that we might, if necessary, at any time we discovered that Mr. Schlessinger was not keeping faith with the creditors in taking care of the business, that he could be removed. [105] That is, if he wasn't honest. In order to prevent his dissipating the funds or misappropriating them, to the detriment of creditors, generally, and the Clere Clothing Company as one of them. There was no other reason for my taking in my name any of the stock of the Prager-Schlessinger Company. This was done under advice of counsel. I might add that we wanted a customer out there and we thought he would make good, and if he made good and paid

(Testimony of Thomas H. Clere.)

us up we were willing to turn back the stock with the script. I hardly think of anything other than what I have testified to, that I choose to state, in regard to this matter. I never authorized the Prager-Schlessinger Company to deposit any moneys in the National Bank of Commerce in the name of the Clere Clothing Company. I never knew that any moneys were deposited by the Prager-Schlessinger Company in the name of the Clere Clothing Company, until after the petition in bankruptcy was filed. Checks received by me in payment of merchandise, or otherwise, were signed Prager-Schlessinger Company, per Louis Schlessinger, President. The Clere Clothing Company never held any stock, that is to say script, of the Prager-Schlessinger Company.

Cross-examination.

When Prager-Schlessinger paid us up we were willing to turn back the stock—the script. I did not hold it as security for the debt of the Clere Clothing Company. I held it for all other creditors as well. If they paid us up and it looked as though they were successful, I was going to turn it back to them; we were, that is, Newton and myself. I held all but two shares in my own name, one share was in Newton's name and one was in Schlessinger's. Newton was a clerk in the office of the attorneys for the Prager-Schlessinger Company. As to whether Belden & Losey represented the Clere Clothing Company in the first bankruptcy proceedings, I didn't know that they were attorneys. I don't know that other attorneys were attorneys for Schlessinger [106] in

(Testimony of Thomas H. Clere.)

the bankruptcy matter and that Belden didn't represent them in that bankruptcy matter at all, even up to the time the composition was made. I said I paid out \$26,247 to that composition. I don't just recall whether I paid the Trustee \$21,474.83, the item of \$26,000, that is the amount that was required to be put up. When I put up this money, Mr. Smith had charge of it. I do not know how much was paid to the Exchange Bank outside of the amount it got in dividends. If I only paid the Trustee \$21,474.83, I suppose the balance of it went for expenses. I do not know whether it was paid to the Exchange Bank over and above its dividend. I did not know who the Exchange Bank were. I think the Clere Clothing Company got twenty-five cents on the dollar on their claim. Our books do not show that the claim of the Clere Clothing Company was paid in full. I think twenty-five cents on the dollar is all we got. I don't know whether the check to Mr. Ball for his twenty-five per cent dividend was turned over to the Clere Clothing Company. I don't know whether a part of the check of Cohen, Rosenhaupt & Blake was turned over to the Clere Clothing Company—the check which came from the referee. I don't know anything about the check of A. Crystal or whether it was turned over to the Clere Clothing Company. I don't know whether a check of M. Manley and James J. Murphy was turned over to the Clere Clothing Company. I don't know whether Clara Prager, S. S. Prager and R. Hutchins turned their checks over to the Clere Clothing Company. I know nothing about

(Testimony of Thomas H. Clere.)

it. If this money had come into the hands of the Clere Clothing Company, I don't think our books would show, because we borrowed the money out there; there were certain moneys paid on the note which we borrowed of the bank. I don't know whether the claims of these people whose names I have mentioned were allowed by the Referee. If the checks bear the indorsement of the Clere Clothing Company, Mr. Smith could better explain how we handled the checks, or whom we got them of, or anything of that kind, because he [107] handled it. I don't know anything of any other expenditure of money of this composition by our people than the payment to Referee of the sum that he was to distribute among the creditors. We put up and borrowed \$26,247 in the composition. I presume that it was to go into that composition. That was what it was borrowed for. I don't know whether anything was said in the composition about the Prager-Schlessinger Company paying the attorney's fees of the claimants, or any of them. But we did borrow the amount of \$26,247, and that was the amount we put up. I don't know where it went to. I had nothing to do with checking it out, or paying it out, or giving the notes. Mr. Smith gave the notes. I don't think the list of creditors was ever submitted to me, so that in passing on the question of advancing the amount of composition. I don't absolutely know whether the amount represented by Mr. Smith was correct or not, except that we took his word for it. I knew nothing of the various checks that were paid out by the referee to

(Testimony of Thomas H. Clere.)

the creditors whose names I have mentioned in this composition having come to the Clere Company. I couldn't say whether they did or did not. Answering your question, if we did, would that be a proper credit to be allowed the Prager-Schlessinger Company, or were I to keep it, I will say I never went into that proposition and know nothing about it. I think it was in July that I took the assignment of this script. It was not when I advanced the \$26,000. I think it was in May I advanced the \$26,000. I didn't turn over the property to the Prager-Schlessinger Company until January following, but took the script from the Prager-Schlessinger Company in July, when they owed me nothing. At that time they didn't owe me a dollar. That was to secure the honest purpose of Mr. Schlessinger, and that purpose was to be honest. I just made him put up this stock to insure me that he would be honest and I was to be the judge of his honesty. No, he did not run [108] the business as the sales agent for the Clere Clothing Company until the following January. He was selling the goods of the Clere Clothing Company. They were insured in the name of the Clere Clothing Company. I do not know that the money was deposited in the name of the Clere Clothing Company the same as it was when Gilmore was there. I don't know that I had changed the account. I think they paid about \$10,000 at my direction, to the bank, on these notes. I don't recall the amount that they paid on those notes to the Bank that we had given for this money we got to make the composition. We turned

(Testimony of Thomas H. Clere.)

over this stuff to Schlessinger on consignment. We didn't direct where he should do business or make his deposits. We had no security whatever, except the goods, at all, for the amount of goods or his accounting for them. When he would sell the goods, we had no security then about his accounting for the money. It is not a fact that that is what we took this script for, to secure us when we turned the goods over to the Prager-Schlessinger Company. That had nothing to with it at all. The invoice of the goods at the time we made the sale in January was \$30,600, when we sold the goods and took this note. It is not a fact that this invoice was a little over \$26,000.

(By Mr. NUZUM.)

Q. Isn't it a fact that that invoice was a little over \$26,000? You remember the conversation that we had up in Belden's office when Belden, Mr. Schlessinger, Mr. Clere and myself were there, in which I asked you about the giving of the note for more than the invoice, and you answered that a man could give a note for what he wanted to? A. I do not.

Q. Do you remember on that date that Mr. Schlessinger asked you as to a memorandum that was used in arriving at this amount of \$30,600, and you said that you had that memorandum but [109] that it wasn't with you?

A. I think that is a fact. I think Mr. Newton has that memorandum now. There was a memorandum used in arriving at the \$30,600, that is the amount due the Clere Clothing Company.

Q. That memorandum showed the merchandise

(Testimony of Thomas H. Clere.)

from April to May, 1912, and from August 8 to December 27, 1912, and the amount deposited with the trustee, the amount paid the Exchange Bank, in full, the balance I mean to make the Clere Clothing Company claim paid in full, and the balance in expense paid out to Mr. Smith and other individuals, making a total of \$30,600, that was the memorandum.

A. I presume it was; I don't know about the Exchange Bank.

Q. You did have a memorandum of that sort in which you figured out what the Clere Clothing Company had obligated itself to pay in order to arrive at what you took this note for. In other words you wanted to be made whole.

A. What was due the Clere Clothing Company at that time, that is, if it was all paid up; there was nothing due the Clere Clothing Company as it owned all the stock.

Q. The Clere Clothing Company wanted to be made whole in this matter before it would turn over this stock of goods?

A. That was the amount due; I don't understand making whole.

Q. What do you mean by the amount due?

A. The amount that was due the Clere Clothing Company, the amount that they had invested out there.

Q. And that was the amount that you figured when you made this note.

A. I didn't make out the note.

(Testimony of Thomas H. Clere.)

Q. Well, when you agreed on the amount of the note.

A. I presume it was fixed up in some manner like that.

Q. What you understood you got was a note that would pay up [110] the Clere Clothing Company for all the money they had put in and obligated itself to pay, and the balance of their account in full.

A. I don't know whether we ever crossed that original debt off to profit and loss, or not. Yes, there was a memorandum used. We did have a memorandum which showed the figures which we claimed the Clere Clothing Company was out or had invested.

Q. And that was the amount the note was made for, isn't that a fact? A. I think that is all.

Q. If you did pay the Exchange Bank \$4,272.20 over and above its dividend, that was included, wasn't it?

A. I know nothing about the Exchange Bank whatsoever. I didn't know they had such a bank out there.

Q. Don't you remember in discussing the matter with Mr. Belden that day, either you or Mr. Belden told me that that amount was paid the Exchange Bank to get some papers away that might incriminate Mr. Prager?

A. I never heard of any such conversation. In all my transactions with the Prager-Schlessinger Company, I was principally representing the Clere Clothing Company. Prager-Schlessinger did not owe me anything individually. I was out there represent-

(Testimony of Thomas H. Clere.)

ing the Clere Clothing Company. Anything I sold there was the property of the Clere Clothing Company and anything that I got from them in the way of notes was the property of the Clere Clothing Company.

Q. The stock you say you held as an individual?

A. The script.

Q. The script you held as an individual and you say you would return it when the debt due the Clere Clothing Company was paid? [111]

A. Well, I think I had a conversation that when all his debts were paid, I think that is the arrangement that we made, when he cleaned up, when he was successful.

Q. That is, he couldn't owe anybody?

A. I think that was the understanding, that I was to hold it. I don't think the stock on its face designated me as Trustee. I think I still have the stock. I don't think I have got Schlessinger's one share now. I don't think I took an assignment for that from Schlessinger on dismissal of the litigation out there.

Q. Who designated Newton as one of the stockholders?

A. I think Schlessinger wanted him.

Q. You know that you designated him yourself because he was under your attorneys, don't you?

A. I don't remember of putting him in. I think Schlessinger wanted him.

Q. You know, don't you, that he is one of the firm that has represented you in all of this litigation and

(Testimony of Thomas H. Clere.)

all the negotiations with regard to Belden & Losey?

A. I know that he is one of their firm.

Q. You know that he represented you in the negotiations commenced by Prager and his wife against you and the Clere Clothing Company?

A. I think they did, that is, from last July on; I don't think they represented us before that.

Q. Did you ever pay them any attorneys' fees?

A. We did not.

Q. Do you remember my reading over the list to you of what Mr. Prager claimed had gone to make this \$30,000 note, and [112] the amount of \$250 attorneys' fees for Belden & Losey was in there, and you said you knew nothing of that \$500 for Levy of the Credit Clearing House, and you said you knew nothing of that and Smith's bill of \$1,890 and one Dansiger of \$450, and you said that you thought Mr. Smith ought to give it back because he had spent over two months out there away from his business; do you remember that?

A. I hardly think I do.

Q. Well, do you remember my reading a list over to you in which the only item you disputed in the whole list was the amount you owed Belden & Losey, in making up the items of that \$30,600 note?

A. I don't remember. During the time that the Prager-Schlessinger Company was conducting the business as our sales-agent, I wrote some letters to some of the creditors concerning their situation. I did not mention to the creditors at that time that the Prager-Schlessinger Company was doing busi-

(Testimony of Thomas H. Clere.)

ness as our sales-agents. I did represent to them that they were conducting business in their own name at that time. I wrote probably fifty letters to people that wrote us for references, and I told them that I thought they were all right.

Q. That at that time you knew that they were doing business as if they owned this stock of goods, although it belonged to you?

A. No, they bought other goods; they were doing business and held our goods simply on consignment. But from everybody else they bought goods out and out.

Q. You were also using their paper to some extent, weren't you? [113]

A. We did have as high as \$3,000 in accommodation notes in denominations of \$500 each and as they came due we paid them.

Q. In other words you had their accommodation notes out, although they owed you practically nothing at that time?

A. That is a fact. That was done at my suggestion. The note which you exhibit me here is on the series you refer to. (Received and marked Exhibit One.)

Q. There was meeting of the trustees and stockholders and both of the Prager-Schlessinger Company prior to the time that they were declared bankrupt in this last proceeding in the summer of 1913?

A. Well, I don't know whether there was one or not.

Q. Don't you remember that the notice showed that

(Testimony of Thomas H. Clere.)

at the meeting you and Newton voted that a voluntary petition be filed or bankruptcy admitted after the involuntary petition in bankruptcy had been filed?

A. I don't remember.

Q. Don't you remember that you gentlemen requested that I have Schlessinger there after we had dismissed the litigation that the Pragers had brought against you that he might agree to it?

A. Whatever was done I haven't any recollection of out there.

Q. If you attended any meetings of the stockholders or trustees at that time and the record showed so, for whom were you acting? A. Myself.

Q. Anything to do with the Clere Clothing Company? A. Not in that, I don't think.

Q. Whom were you representing when the Clere Clothing Company by you joined in the involuntary petition in bankruptcy? [114]

A. I presume I was representing the Clere Clothing Company, if it did.

Q. So that in petitioning for the involuntary bankruptcy you acted for the Clere Clothing Company, and in agreeing to the voluntary bankruptcy of the corporation you were acting individually, as I get you?

A. Why I presume that might be the case.

Q. In arriving at the amount that the Clere Clothing Company had invested out there, as you say you did, when you fixed the amount of this note, was any allowance made for the moneys paid by Schlessinger on account of the note to the National Bank

(Testimony of Thomas H. Clere.)

of Commerce? A. There was.

Q. Was any amount allowed for the something like \$3,500 in preference claims, in claims that the trustee paid to the individuals whose names I have mentioned and turned over to you or to the Clere Clothing Company?

A. I don't know anything about that; I don't know who those people are at all.

Q. There was a charge made if you did pay anything to the Exchange Bank over the twenty-five per cent for that amount?

A. That is something I don't know anything about.

Q. What I want to get at is that you didn't pay out anything to the Exchange Bank and not include it in this note?

A. I know nothing about the Exchange Bank of any name or nature.

Q. Do you mean that you don't know nor did not then?

A. I didn't then; I know very little new about it.

Q. Then you don't know whether the Exchange Bank note was in the amount of \$26,272 or not?

A. I know nothing about the Exchange Bank.
[115]

Q. And you did not know anything about the return of this preference money?

A. No, sir, if there was, I knew nothing about it.

Q. Did you let them know by any act of yours any of the merchants in Spokane that the Prager-Schlesinger Company were selling these goods on consignment?

(Testimony of Thomas H. Clere.)

A. I don't recall ever saying a word to any one about that out there. We had been running or conducting the business as the business of the Clere Clothing Company when Gilmore was running it. It was moved down on to Howard Street about the time they reorganized the business.

Q. The sale in the old place was advertised as a sale of the Prager-Schlessinger Company stock?

A. I don't know how he did advertise it.

Q. And the sale in the other place while it was selling your goods on consignment was still advertising a sale of the Prager-Schlessinger Company?

A. I don't know. The bank account when Gilmore was conducting the sale was in the name of the Clere Clothing Company. I didn't know until in the summer of 1913 how the bank account had been run. I never knew how they carried their account from the time Prager-Schlessinger took it in August until after we had given them a bill of sale.

Q. Then you learned that it had been in the name of the Clere Clothing Company all the time?

A. The banker stated to me last July that he didn't care to have the Prager-Schlessinger name on his books, and he, therefore, for convenience sake let the account run along on his books under our name but honored the Prager-Schlessinger Company's checks.

Q. Did you ever instruct the Prager-Schlessinger Company [116] when they were conducting this sale as commission merchants not to purchase any goods from anybody else?

A. No, I never gave them that instruction.

(Testimony of Thomas H. Clere.)

Q. You knew that in conducting a business of that sort at times you would run out of sizes and at times would have to buy from local merchants, didn't you?

A. I presume the Prager-Schlessinger Company had to buy goods all over.

Q. Some of the goods were charged directly to the Clere Clothing Company, for instance, out there in Spokane.

A. I never knew that there were any goods charged to the Clere Clothing Company until I went out last July. I don't think I at any time have consulted with old man Prager or any of the stockholders of the company, other than Newton, as to the voting of the stock of the Prager-Schlessinger Company. I don't know whether Mr. Newton and myself ever disagreed on our vote of the stock at any of the meetings or my vote as trustee.

Q. Do you state now that the inventory that was shown you at the time this note was given amounted to \$30,600?

A. That was the amount of our goods that he had there; he had other goods besides that.

Q. And also the bills that you had against the Prager-Schlessinger Company amounted to exactly \$30,600? A. Whatever that note represented.

Q. So that the amount of goods on hand and the amount of moneys you had paid out and they were owing you for any purpose exactly agreed?

A. As per their inventory; they had other goods besides that.

Q. And in their \$30,640 was the balance due the

(Testimony of Thomas H. Clere.)

Clere Clothing Company to pay them in full instead of twenty-five [117] cents on the dollar, as per their composition?

A. Well, I don't just get that question.

Q. You don't remember whether that was one of the items or not? A. No.

Redirect Examination.

The memorandum that I had out there, mention of which has been made, was made by the bookkeeper of the Clere Clothing Company. I took his statement for it. Prager-Schlessinger Company did not pay the Clere Clothing Company any moneys which they have not been given credit for on the books of the Clere Clothing Company. I think the script of the Prager-Schlessinger Company that I had is out there in Mr. Newton's office now. These accommodation notes referred to were purely and simply accommodation notes. Mr. Schlessinger wrote us a letter stating that any notes he gave us were accommodation notes only and we must take care of them when they came due. That letter is either in Spokane or in my office. There were never any accommodation notes given by Schlessinger to me or to the Clere Clothing Company, which have not been paid. He never paid a cent of any of those accommodation notes. The Clere Clothing Company always paid them when they came due. We never made any charge against the Prager-Schlessinger Company for any of those notes so paid by the Clere Clothing Company. We never gave them credit for them or never charged them when we took them up. They

(Testimony of Thomas H. Clere.)

were purely and simply accommodation notes. The reason we took them was a few years before that they used to give us notes and we used to re-discount them. I never authorized, directly or indirectly, Childs or any other person to carry the Prager-Schlessinger Company account in the name of the Clere Clothing Company, and if it was done, it was done without my consent or knowledge, of either I or my Company. I never received a check from the Spokane store conducted under the name of Prager-Schlessinger Company, in any name other than the Prager-Schlessinger. [118] Every check we ever got was signed Prager-Schlessinger Company, by Louis A. Schlessinger, President.

Recross-examination.

Q. You say that the Prager-Schlessinger Company got pay for everything that they gave you, or paid you; if there was any money returned to you on account of these claims that were allowed by the referee and checks given and the checks turned over to you, whom were they credited to?

A. I don't ever remember of getting any. I don't know anything about it.

Q. Isn't it a fact that during the first part of Schlessinger's running the business, after he took it over from the Gilmore Company, that he signed the checks of the Clere Clothing Company, per Schlessinger, and that that continued for three or four months after he took it over?

A. I don't know that up to last July that he ever signed a check in our name.

(Testimony of Thomas H. Clere.)

Q. You did find out that he had for awhile?

A. He had signed one or two checks.

Q. Did you ever give them any authority?

A. Never.

Q. Your attention has been called to certain alleged checks having been turned over by creditors of the Prager-Schlessinger Company; did your company ever receive any checks from the distribution of the Prager-Schlessinger Company estate in the first bankruptcy? A. It did not.

Q. To your knowledge you never received any checks? None ever came to Syracuse?

A. None ever came to Syracuse. [119]

IT IS HEREBY STIPULATED AND AGREED by and between Wakefield & Wither-
spoon, attorneys for the Union Trust & Savings
Bank, Trustee in Bankruptcy for the Prager-Schles-
singer Co. and Belden & Losey, attorneys for the
claimant, Clere Clothing Co., that the above and fore-
going is a full, true and complete statement of the
evidence used upon the different hearings upon the
objections to the allowance of the claim of the Clere
Clothing Co., and is hereby approved.

Dated at Spokane, Washington, this 19th day of
December, 1914.

(Signed) WAKEFIELD & WITHERSPOON,
Attorneys for the Union Trust & Savings Bank,
Trustee in Bankruptcy for Prager-Schlessinger
Co.

(Signed) BELDEN & LOSEY,
Attorneys for Clere Clothing Co.

[Endorsements]: Bill of Exceptions. Received December 19, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. Filed in the U. S. District Court for the Eastern District of Washington, January 6, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [120]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

In the Matter of PRAGER-SCHLESSINGER CO.,
a Bankrupt.

Certificate of Trial Judge as to Evidence.

I, F. H. RUDKIN, District Judge in and for the Eastern District of Washington, Northern Division, do hereby certify that the above-entitled cause came on regularly for hearing before me, on review from the Referee in Bankruptcy, at a regular term of said Court, on the 8th day of October, 1914, the petitioner Clere Clothing Co. being represented by its counsel, Messrs. Belden & Losey, and the Union Trust & Savings Bank, Trustee in Bankruptcy, was represented by its counsel Wakefield & Witherspoon, and there being no further appearance in said cause, I do further certify that on said hearing, all the evidence in said cause was certified to and transmitted to me by the Referee in Bankruptcy, Hon. Sidney H. Wentworth, and that the evidence presented to me, and upon which said cause was heard by me, is as hereinafter set out; and I do further certify that the exhibits referred to in the evidence were considered

by me and said exhibits, being marked as shown in the evidence and ordered certified to the United States Circuit Court, are to be made a part of said record, the originals being used in place of having same transcribed.

Dated this 6th day of January, A. D. 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Approved, Wakefield & Wither-
spoon, Attorneys for Trustee. Certificate of Trial
Judge as to Evidence. Filed in the U. S. District
Court for the Eastern District of Washington. Janu-
ary 6, 1915. W. H. Hare, Clerk. By S. M. Russell,
Deputy. [121]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

In the Matter of the Estate of PRAGER-SCHLE-
SINGER COMPANY, Bankrupt.

Praeipie for Transcript of Record.

To the Clerk of the District Court of the United
States for the Eastern District of Washington,
Northern Division:

You will please prepare transcript of the complete
record in the above-entitled case, to be filed in the
office of the Clerk of the United States Circuit Court
of Appeals for the Ninth Judicial Circuit, under
appeal to be perfected to said Court, and include in
said transcript, full proceedings, pleadings, papers,
records and files, to wit:

Order of Adjudication,
Claim of the Clere Clothing Company,
Objections filed to claim of Clere Clothing Company,

Opinion of referee expunging said claim,
Opinion of Hon. Frank H. Rudkin, on review of said referee's report,

Order disallowing said claim on review,
Petition for appeal, and allowance of appeal,
Assignment of Errors,

Citation,

Bond on Appeal,

Stipulation extending time to file Bill of Exceptions,

Bill of Exceptions,

Praecipe,

Also any and all other record entries, pleadings, proceedings, papers and files necessary and proper to make a complete [122] record upon appeal in said cause.

Transcript to be prepared as required by law, and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) BELDEN & LOSEY,
Attorneys for Clere Clothing Co.

Service of the within Praecipe is hereby acknowledged this 28th day of November, A. D. 1914.

(Signed) WAKEFIELD & WITHERSPOON,
Attorneys for Union Trust & Savings Bank, Trustee.

[Endorsements]: Praeceptum for Transcript of Record. Filed in the U. S. District Court for the Eastern District of Washington, November 30, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy.
[123]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

In the Matter of the Estate of PRAGER-SCHLESINGER COMPANY, a Corporation,
Bankrupt,

**Stipulation [Extending Time to File Record in
Appellate Court, and Re Transmission of
Original Exhibits, etc.].**

IT IS HEREBY STIPULATED AND AGREED by and between Wakefield & Witherspoon, attorneys for the Union Trust & Savings Bank, Trustee in Bankruptcy for Prager-Schlesinger Co., and Belden & Losey, attorneys for the Clere Clothing Co., as follows:

1. That the time within which to file in the above-entitled court, the record in the above-entitled action, may by order of this Court, upon the filing of this stipulation, be extended thirty days from date hereof.

2. That the original claims filed by the Clere Clothing Co. in the above-entitled action, together with all original exhibits noted in the Bill of Exceptions, may be transmitted to the Circuit Court of Appeals, upon the hearing of said cause, to be considered with like force and effect as though copies

thereof were certified to and made a part of the Bill of Exceptions herein.

Dated at Spokane, Washington, this 19th day of December, 1914, without waiving any rights as to matters referred to in motion to dismiss.

(Signed) WAKEFIELD & WITHERSPOON,
Attorneys for Union Trust & Savings Bank, Trustee
for Prager-Schlesinger Co.

(Signed) BELDEN & LOSEY,
Attorneys for Clere Clothing Co.

[Endorsements]: Stipulation. Filed in the U. S. District Court for the Eastern District of Washington. January 4, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [124]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

In the Matter of the Estate of PRAGER-SCHLESINGER COMPANY, a Corporation,
Bankrupt.

Order [Extending Time to January 19, 1915, to Prepare Record, and Directing Transmission of Original Exhibits to Appellate Court (Copy)].

Upon stipulation of the parties hereto,

IT IS NOW HERE ORDERED that the time for preparing and submitting the record in the above-entitled action, and perfecting said appeal be, and the same is hereby extended to January 19th, 1915.

IT IS FURTHER ORDERED that the original claims filed by the Clere Clothing Co. in the above-entitled action, together with all original exhibits

noted in the Bill of Exceptions, be transmitted to this Court, and that upon the hearing of said cause, same be considered with like force and effect as though copies thereof were certified to and made a part of the Bill of Exceptions therein.

(Signed) WM. B. GILBERT,
One of the Judges of Said Court.

[Endorsements]: Order Extending Time. Filed in the U. S. District Court for the Eastern District of Washington. January 4, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [125]

**[Certificate of Clerk, U. S. District Court to
Transcript of Record.]**

United States of America,
Eastern District of Washington,—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages to be a full, true, correct and complete copy of the record and all proceedings had in said action as called for by the plaintiff and appellant in the praecipe for a transcript of the record herein, as the same remains of record and on file in the office of the Clerk of said District Court; and that the same constitutes the Record on Appeal from the order, judgment and decree of said District Court of the United States for the Eastern District of Washington to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that I hereto attach and herewith transmit the original Order extending time for preparing and submitting the record and directing that the original exhibits noted in the Bill of Exceptions be transmitted to the said Court.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of eighteen dollars and thirty-five cents (\$18.35), and that the same has been paid to me by Belden & Losey, solicitors for complainant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the City of Spokane, in said Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 7th day of January, A. D. 1915, and [126] the Independence of the United States of America the One Hundred and Thirty-ninth.

[Seal]

W. H. HARE,

Clerk U. S. District Court for the Eastern District
of Washington.

[Citation on Appeal (Original).]

*United States Circuit Court of Appeals, for the
Ninth Circuit.*

In the Matter of PRAGER-SCHLESINGER CO.,
a Corporation, Bankrupt.

United States of America,
Ninth Judicial Circuit,—ss.

To the UNION TRUST & SAVINGS BANK,
Trustee, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in said Circuit, on the 24th day of December, 1914, pursuant to a petition on appeal and assignment of error filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, in the matter of Prager-Schlesinger Co., a corporation, bankrupt, to show cause, if any there be why the judgment rendered in said cause on the 10th day of October, 1914, denying and expunging from the list of claims filed in said cause, the claims of the Clere Clothing Co., and disallowing each of said claims, as proved by said Clere Clothing Co. before said Referee, in the sums of \$30,640 and \$1610.67, respectively, as in said petition on appeal mentioned, should not be corrected and why speedy justice should not be done in that behalf.

WITNESS the Hon. WM. B. GILBERT, Judge
of said Circuit Court, this 25th day of November, in

the year of our Lord, 1914, and of the Independence of the United States of America, the one hundred thirty-ninth.

[Seal]

WM. B. GILBERT,
Circuit Judge. [127]

Service of the within Citation admitted at Spokane, Wash., this 27th day of November, 1914.

WAKEFIELD & WITHERSPOON,
Attys. for Union Trust & Savings Bank, Trustee for
Prager-Schlessinger Co.

[Endorsed]: No. 1742. United States Circuit Court of Appeals, for the Ninth Circuit. In the Matter of Prager-Schlesinger Co., a Corporation, Bankrupt. Citation. Filed in the U. S. District Court, Eastern Dist. of Washington. Nov. 27, 1914. Wm. H. Hare, Clerk. S. M. Russell, Deputy. [128]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

In the Matter of the Estate of PRAGER-SCHLES-
SINGER CO., a Corporation,
Bankrupt.

**Order [Extending Time to January 19, 1915, to
Prepare Record, and Directing Transmission
of Original Exhibits to Appellate Court
(Original).]**

Upon the stipulation of the parties hereto,

IT IS NOW HERE ORDERED that the time for preparing and submitting the record in the above-entitled action, and perfecting said appeal be, and the same is hereby extended to January 19th, 1915.

Order [Extending Time to File Record in Appellate Court to January 19, 1915 (Original).]

IT IS FURTHER ORDERED that the original claims filed by the Clere Clothing Co. in the above-entitled action, together with all original exhibits noted in the Bill of Exceptions, be transmitted to this Court, and that upon the hearing of said cause, same be considered with like force and effect as though copies thereof were certified to and made a part of the Bill of Exceptions therein.

WM. B. GILBERT,

One of the Judges of Said Court.

O. K.—BELDEN & LOSEY.

O. K.—WAKEFIELD & WITHERSPOON.

[129]

[Endorsed]: In the United States Circuit Court of Appeals, for the Ninth Circuit. In the Matter of the Estate of Prager-Schlessinger Co., a Corporation, Bankrupt. Order. Filed in the U. S. District Court, Eastern Dist. of Washington. Jan. 4, 1915. Wm. H. Hare, Clerk. S. M. Russell, Deputy. [130]

[**Proof of Claim of Clere Clothing Co., for \$1,610.67.**]**CLERE CLOTHING COMPANY,**

Makers of

"Clere Clothes,"

Syracuse, N. Y., Feby. 4, 1913.

Sold to M Prager Schlesinger Co

Spokane, Wash.

Terms..... Shipped by Md c/o Soo Line

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made.

Strictly in Accordance With Terms on Bill.

6071 H	3	Suits	12 00	36 00
6070 D	3	"	12 00	36 00
6218 Stout	3	"	12 50	37 50
6218 H	6	"	12 50	75 00
6058 Stout	4	"	11 00	44 00
6058 H	5	"	11 00	55 00
6058 A	5	"	11 00	55 00
6321 H	3	"	15 00	45 00
6067 Long	3	"	12 00	36 00
6067 A	4	"	12 00	48 00
6216 H	8	"	12 50	100 00
6393 H	2	"	18 00	36 00
6219 A	6	"	12 50	75 00
6097 St	4	"	12 00	48 00
6097 H	4	"	12 00	48 00
6097 Long	3	"	12 00	36 00
6097 A	2	"	12 00	24 00
6032 K	3	Coats & Pants	10 00	30 00

 864 50

Duplicate.

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Mar. 12, 1913.

Sold to M Prager Schlesinger Co

Spokane, Wash.

Terms..... Shipped by Md c/o Soo Line

If this Bill differs from your understanding of purchase, please notify us at once, settlement must be made.

Strictly in Accordance With Terms on Bill.

6141	Long	2	Suits	14 00	28 00
6141	H	4	“	14 00	56 00
6091	H	5	“	12 00	60 00
6119	H	5	“	13 00	65 00
6282	H	3	“	13 50	40 50
6219sh	Stout	4	“	12 50	50 00
6027	St	5	“	10 00	50 00
6092	G	3	“	12 00	36 00
6201	A	3	“	12 50	37 50
6023	E	3	“	10 00	30 00
6030	A	3	“	10 00	30 00
6030	Long	3	“	10 00	30 00
6032	D	3	“	10 00	30 00
6027sh	Stout	4	“	10 00	40 00
6023	L	3	Coats & Pants	10 00	30 00
6092	K	3	“ “	12 00	36 00

649 00

Duplicate.

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., April 21, 1913.

Sold to M Prager Schlesinger Co

Spokane, Wash.

Terms..... Shipped by Express.

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made.

Strictly in Accordance With Terms on Bill.

5829 A	1 Suit	15 00	
6004 A	1 "	15 00	
6160 A	1 "	10 50	40 50

Duplicate

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., April 29, 1913.

Sold to M Prager Schlesinger Co

Spokane, Wash.

Terms Net. Shipped by Parcel Post.

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made.

Strictly in Accordance With Terms on Bill.

6058 C	1 Pant	4 00	
	Postage	24	
x	Ins	43	4 27

Duplicate.

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., May 6, 1913.

Sold to M. Prager Schlesinger Co

Spokane, Wash.

Terms:

Custom Goods net Cash.....

Monday following shipment.

(Settlement to be made Strictly in accordance with Terms on Bill.)

Shipped by Parcel Post.

		15 00
1 Suit	Geo W Burke	Postage 84
		Ins 05 15 89

Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., May 20, 1913.

Sold to M Prager Schlesinger Co

Spokane Wash

Terms:

Custom Goods Net Cash.....

Monday following shipment.

(Settlement to be made Strictly in accordance
with Terms on Bill.)

Shipped by Ex.

1800

1 Suit Ex Pant Max Stintman 500 23 00

425

1 Pant Geo W Burke Cuff Pant 25 4 50 27 50
Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., June 10, 1913.

Sold to M Prager Schlesinger Co

Spokane Wash

Terms:

Custom Goods Net Cash.....

Monday following shipment.

(Settlement to be made Strictly in accordance
with Terms on Bill.)

Shipped by Parcel Post.

450

2 Pants 400 8 50

Postage 48

Insurance 03

4

In the District Court of the United States, in and for
the Eastern District of Washington.

No. In Bankruptcy.

In the Matter of PRAGER-SCHLESSINGER CO.,
Bankrupt

PROOF OF CLAIM

STATE OF New York COUNTY OF Onondaga, ss.

At Syracuse, in said County and State, on the 15th
day of August, A. D. 1913, came James E. Clancy of
Syracuse and made oath and says:

(1) That he is treasurer

(or equivalent officer)

of the Clere Clothing Company, a corporation,
incorporated under and by the laws of the State of
New York and carrying on business at Syracuse, in
the County of Onondaga and State of New York,
and that he is duly authorized to make this proof;

(2) That he is one of the firm of.....,
consisting of himself and.....of.....
in the County of.....in the State of
.....

That the above named bankrupt, the person against
whom a petition for adjudication of bankruptcy has
been filed, was at and before the filing of said peti-
tion, and is still justly and truly indebted to said
Corporations in the sum of one thousand six hun-

(Insert "said corporation," or "this deponent's
said firm, or "said [Name Creditor],"
as the case may be.)

dred-ten and 67/100 dollars, with interest from
....., 19...., at per cent. per an-
num; that the nature and consideration of said debt
is as follows: *Merchandise sold and delivered to
said bankrupt at its request as per itemized state-*

ment filed herewith and made part hereof, ~~(or promissory notes, originals of which are filed herewith and made a part hereof).~~ That the consideration of said promissory note is as follows.....

Draw a line through parts of this paragraph underscored in red if a note has been received.

..... That no part of said debt has been paid except..... that there are no set-offs or counter claims to the same except..... and that claimant has not, nor has any person by his order, or to the knowledge or belief of said deponent, for claimant's use, had or received any manner of security for said debt whatever. That said claim consists of an open account due on That no judgment has been rendered on said debt *nor has any note been received for such account.*

Ignore this paragraph except when proof can not be made by the treasurer of corporation or a member of the firm, or the individual who is the creditor, in which case show some good cause, such as absence, illness, etc., for such failure.

And this deponent further says, that this affidavit can not be made by
.....

(Sign here) JAS. E. CLANCY,

Treasurer.

SUBSCRIBED AND SWORN to before me this 15th day of August, 1913.

JOHN C. BOLAND,

(Notary Public.)

Onon. Co., N. Y.

My commission expires Mar. 30, 1915.

POWER OF ATTORNEY.

To E. H. Belden, W. C. Losey or H. R. Newton
The undersigned Clere Clothing Co., of Syracuse, in the County of Onondaga and State of New York, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt

aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other time and place as may be appointed by the court for holding such meeting or meetings, or at which meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of the undersigned to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of said bankrupt, and for the undersigned to assent to such appointment of trustee, and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due the undersigned under any composition, and for any other purpose whatsoever in the interest of the undersigned, with full power of substitution, and the undersigned does hereby revoke any and all prior powers of attorney that may have been given by the undersigned.

In Witness Whereof, the name and seal of the

undersigned is hereby affixed the 15th day of August
A. D. 1913.

(Sign here) CLERE CLOTHING CO., (Seal)

Signature of Claimant, whether corporation, firm or individual.

By JAS. E. CLANCY,

Treasurer.

Signed, sealed and delivered in the presence of

THOMAS K. SMITH.

State of New York,

County of Onondaga,—ss.

BE IT REMEMBERED that on this 15th day of August, 1913, personally appeared before me James E. Clancy, who being by me first duly sworn, did say that he is duly authorized to execute the foregoing power of attorney in behalf of said creditor, and acknowledged that he executed the said power of attorney for and on behalf of said Clere Clothing Co. and to be his free act and deed and the free act and deed of said creditor and that he is duly authorized to act.

JOHN C. BOLAND,

Notary Public in and for the County of Onondaga,
State of New York.

[Seal]

[Endorsed]: Allowed Aug. 25, 1913. S. H. W., Referee. United States District Court, Eastern District of Wash. In the Matter of Prager-Schlessinger Co., Bankrupt. Proof of Claim and Power of Attorney. Claim of Clere Clothing Co., Syracuse, N. Y. (P. O. Address.) Amount \$1610 67/100. Filed Aug. 25, 1913, at 10 o'clock A. M. Sidney H. Wentworth, Referee.

No. 2563. U. S. Circuit Court of Appeals, for the Ninth Circuit. Exhibit Original Proof of Claim of

Clere Clothing Co. for \$1610.67. Received Jan 12, 1915. F. D. Monckton, Clerk.

\$30,640.00

Spokane, Washington Jany. 25, 1913.

On demand after date, without grace I promise to pay to the order of Clere Clothing Co. Thirty thousand six hundred forty no/100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon, in like Gold Coin at the rate of six per cent per annum from date of demand until paid, for value received. Interest to be paid on demand, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof I promise and agree to pay, in addition to the costs and disbursements provided by statute a reasonable sum in like Gold Coin, for Attorney's fees in said suit or action.

Due Demand. At office Clere Clothing Co. No. Syracuse, N. Y.

[Seal] PRAGER SCHLESINGER CO.,
By L. A. SCHLESINGER,
President.

Attest: HENRY R. NEWTON,
Secretary.

[Proof of Claim of Clere Clothing Co. for \$30,640.00,
etc.]

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., Aug 19 1912

Sold to M Clere Clo Co

Spokane Wash

Terms Nov. 1

Shipped by DS&W c/o CMSt. c/o CM&PS

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5597-O	2	Overcoats	15 75	31 50
5565 J	7	"	12 50	87 50
5660 a	4	Suits	10 00	40 00
5741 H	3	"	13 00	39 00
5809 a	5	"	16 50	82 50
5709 a	5	"	12 00	60 00
5674 Long	4	"	10 00	40 00
5801 a	6	"	15 00	90 00
5692 B	5	"	11 00	55 00

525 50

Duplicate

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., Aug 23 1912

Sold to M Clere Clo Co

Spokane Wash

Terms Nov 1/13

Shipped by DS&W c/o CM&StP.

c/o CM&PSRR

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5964	a	3	Suits	15 00	45 00
5661	H	7	"	10 00	70 00
5766	H	3	"	14 00	42 00
5762	F	2	"	14 00	28 00
5860	a	4	"	11 50	46 00
5760	H	4	"	14 00	56 00
5664	a	2	"	10 00	20 00
5828	H	9	"	13 50	121 50
5802	a	3	"	15 00	45 00
5718	a	3	"	12 00	36 00

509 50

Duplicate

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., Aug 29 1912

Sold to M Clere Clo Co

Spokane Wash

Terms.....

Shipped by DS&W c/o CM&StP c/o CM&PS

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance with Terms on Bill.

5828 Long	5	Suits	13 50	67 50
5860 H	4	"	11 50	46 00
5860 St	4	"	11 50	46 00
5996 a	2	"	18 00	36 00
5828 St	6	"	13 50	81 00
5690 Long	6	"	11 00	66 00
5664 a	2	"	10 00	20 00
5539 s	4	Overcoats	13 50	54 00
5566 L	4	"	12 50	50 00

 466 50

Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Sept. 5, 1912.

Sold to M Clere Clothing Co

Spokane Wash

Terms Nov. 1.

Shipped by DS&W c/o CM&StP.

c/o CM&PSRR.

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5633	S	3	Overcoats	17 75	53 25
5500	P	4	“	11 25	45 00
5601	S	4	“	15 50	62 00
5565	J	2	“	12 50	25 00
5607	P	4	“	14 75	59 00
5504	P	5	“	11 25	56 25
5502	P	5	“	11 25	56 25
5554	S	3	“	14 00	42 00
5585	P	2	“	15 00	30 00
5522	L	3	“	12 50	37 50
5507	P	6	“	11 25	67 50
5602	P	3	“	15 50	46 50
5549	P	2	“	16 50	33 00
5733	a	4	Suits	13 00	52 00
5733	c	1	“		13 00

678 25

Duplicate

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., Sept. 16, 1912.

Sold to M Clere Clo Co

Spokane Wash

Terms Nov 1

Shipped by DS&W c/o CM&StP.

c/o CM&PSRR.

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5630	S	2	Overcoats	17 00	34 00
5614	T	2	"	16 50	33 00
5503	P	4	"	11 25	45 00
5575	T	3	"	15 50	46 50
5516	N	3	"	11 50	34 50
5693	G	4	Suits	11 00	44 00
5734	F	4	"	13 00	52 00
5688	a	4	"	11 00	44 00
5841	St	3	"	10 50	31 50
5735	c	4	"	13 00	52 00
5662	a	2	"	10 00	20 00
5791	G	3	"	15 00	45 00
5742	B	5	"	13 00	65 00
5767	B	3	"	14 00	42 00
5746	a	5	"	13 00	65 00
5778	B	6	"	14 00	84 00

Book of Custom Samples
Duplicate

737 50

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Sept. 20, 1912.

Sold to M Clere Clothing Co

Spokane Wash

Terms Nov 1

Shipped by DS&W c/o CM&StP.

c/o CM&PSRR.

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

4563	R	1	Overcoat	13 50	13 50
4563		2	“	13 50	27 00
4606		1	Presto Overcoat		12 50
5631	V	1	Overcoat		15 00
8594		3	“	12 50	37 50
5541	P	3	“	13 00	39 00
5983	G	3	Suits	16 50	49 50
5881	a	3	“	12 50	37 50
5828	G	8	“	13 50	108 00
5827	H	14	“	12 50	175 00
					<hr/> 514 50

Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Sept. 24, 1912.

Sold to M Clere Clo Co

Spokane Wash

Terms Nov 1

Shipped by DS&W c/o CM&StP c/o CM&PSRR.

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5829	G	4	Suits	15 00	60 00
5680	St	5	“	11 00	55 00
5996	G	2	“	18 00	36 00
5841	H	4	“	10 50	42 00
5841	a	4	“	10 50	42 00
5935	a	6	“	13 50	81 00
5906	a	6	“	13 50	81 00
5795	a	4	“	15 00	60 00
					<hr/> 457 00

Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Oct. 3, 1912.

Sold to M Clere Clothing Co

Spokane Wash

Terms:

Custom Goods Net Cash.....

Monday following shipment.

(Settlement to be made Strictly in accordance
with Terms on Bill.)

Shipped by.....

1	Suit	W. H. Kell	15	00	
2355	5	yds. cloth (sponged)	2	50	27 50
				<hr/>	

Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Oct. 3, 1912.

Sold to M Clere Cothing Co

Spokane Wash

Terms Net.

Shipped by.....

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5626 St 1 Pant 3 25

Duplicate

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., Oct. 9, 1912.

Sold to M Clere Clothing Co

Spokane Wash

Terms Nov 1/12

Shipped by DS&W c/o CM&StP

c/o CM&PSRR

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5680	H	3	Suits	11 00	33 00
5800	G	3	"	15 00	45 00
5800	H	2	"	15 00	30 00
5829	a	6	"	15 00	90 00
5822	H	3	"	16 50	49 50
5506	P	2	Overcoats	11 25	22 50
5531	O	3	"	12 50	37 50
5634	S	3	"	17 00	51 00

 358 50

Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Oct. 12, 1912.

Sold to M Clere Clo Co

Spokane Wash

Terms.....

Shipped by DS&W c/o CM&St
c/o CM&PSRR

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

F. E. Harris	1 Suit	W. D. Brockway	19 75
“	“ 1 Ex Pant	“ “	5 25
“	“ 1 Suit	W. L. Peck	23 00
“	“ 1 Ex Pant	“ “	7 00
“	“ 1 Suit	F. H. Filbert	20 00
	1 C & P	Kehoe	16 25
	1 Ex Pant	“	5 25
Decker Co.	1 C & P	M. Walrus	13 50
W. J. Varley	1 “	J. G. Faygard	13 50
C. Yogel	1 “	C. Yogel	21 00
Bodger & R.	1 Suit	Fred Bushey	18 00
Hatem	1 “	A. Hatem	18 50
Holcombe & B.	1 “	J. Ryan	20 00
W. J. Varley	1 C & P	J. A. Bird	13 50
“	1 “	B. C. Brown	14 00
Batchelder	1 Suit	H. P. Baldwin	18 00
“	1 Ex Pant	“	5 25

251 75

Duplicate

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., Oct. 19, 1912.

Sold to M Clere Clo Co

Spokane Wash

Terms: Custom Goods Net Cash.....

Monday following shipment.

(Settlement to be made Strictly in accordance with
Terms on Bill.)

Shipped by.....

1 Suit	R. H. Peck	22 50	
1 "	Max Stretman	18 00	40 50

Duplicate

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., Oct 21 1912

Sold to M Clere Clo Co

Spokane Wash

Terms..... Shipped by With Other Goods

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

1 Suit	W H Nye Sargent	13 50	
1 "	Holcomb & Bruso Bruso	22 50	36 00

Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Oct 21 1912

Sold to M Clere Clothing Co

Spokane Wash

Terms Nov 1 Shipped by DS&W c/o CM&StP

c/o CM&PSRR

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5850	A	5	Suits	10 50	52 50
5594	S	4	Overcoats	15 50	62 00
5616	S	3	“	16 25	48 75
5609	S	4	“	15 50	62 00
5530	P	4	“	12 50	50 00
5638	J	4	“	15 00	60 00
					<hr/>
					335 25

Duplicate

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., Oct 22 1912

Sold to M Clere Clo Co

Spokane Wash

Terms Nov 1

Shipped by Express

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5784 a	12	Suits	12 50	150 00
5620 P	2	Overcoats	16 25	32 50
				<hr/> 182 50

Duplicate

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., Oct 25 1912

Sold to M Clere Clo Co

Spokane Wash

Terms Dec 1

Shipped by Express

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5650 AW	1	Suit		13 00
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Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Nov 1 1912

Sold to M Clere Clo Co

Spokane Wash

Terms Dec 1 Shipped by Express

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5528	P	4	Overcoats	12 50	50 00
5904	H	3	Suits	12 50	37 50
5904	C	2	“	12 50	25 00
					<hr/>
					112 50

Completes Order
Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Nov 12 1912.

Sold to M Clere Clo Co

Spokane Wash

Terms: Custom Goods Net Cash....

Monday following shipment.

(Settlement to be made Strictly in accordance with
Terms on Bill.)

Shipped by.....
3 50

1 Vest J. F. Vgier Ex Size 50 4 00
Ex Charges Mail Rate 20 4 20

Duplicate

CLERE CLOTHING COMPANY,

Makers of

"Clere Clothes,"

Syracuse, N. Y., Nov. 20 1912

Sold to M Clere Clothing Co.

Spokane Wash

Terms..... Shipped by M. D. c/o Soo Line

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5190	2	Raincoats	10 50	21 00
5193	5	"	12.50	62 50
5192	3	"	12 50	37 50
8575	1	Overcoat		8 50
4509 L	5	"	13 50	67 50
2528	1	"		13 50
4539 J	10	"	13 50	135 00
1541	5	"	12 50	62 50
4608 L	4	"	13 50	54 00
6909	2	"	12 50	25 00
4569	5	"	12 50	62 50
4570	4	"	12 50	50 00
4644	4	"	13 75	55 00
5586 P	2	"	13 75	27 50
4589 M	6	"	12 50	75 00

 757 00

Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Nov 22 1912

Sold to M Clere Clo Co

Spokane Wash

Terms Net

Shipped by Express

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5784 a 1 Pant

3 75

Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Dec 16 1912

Sold to M Clere Clo Co

Spokane Wash

Terms Net

Shipped by Express

If this Bill differs from your understanding of purchase, please notify us at once, as settlement must be made

Strictly in Accordance With Terms on Bill.

5834 St 1 Pant

4 50

Duplicate

CLERE CLOTHING COMPANY,

Makers of

“Clere Clothes,”

Syracuse, N. Y., Dec 27 1912

Sold to M Clere Clo Co

Spokane Wash

Terms: Custom Goods Net Cash....

Monday following shipment.

(Settlement to be made Strictly in accordance with
Terms on Bill.)

Shipped by Ex.

1 Pant E A Buchanan

5 00

Duplicate.

State of New York,

County of Onondaga,—ss.

James E. Clancy, being first duly sworn, on oath
deposes and says:

That he is the Treasurer of the Clere Clothing Company, and has occupied said position for 1 year and 6 mos.; that he has read the attached Proof of Claim, executed by T. H. Clere; knows the contents thereof, and that the same is true, as he verily believes; that the only knowledge which this affiant has as to said Proof of Claim is information received by him from T. H. Clere, President of the Clere Clothing Company; that T. H. Clere is the Officer of the Clere Clothing Company, who had personal charge and supervision of all the transactions of the Clere Clothing Company and Prager-Schles-

singer Co., out of which the attached claim arose.

Further affiant saith not.

JAS. E. CLANCY.

Subscribed and sworn to before me this 15th day of August, 1913.

[Seal]

JOHN C. BOLAND,
Notary Public in and for the State of New York,
Residing at Syracuse, Onondaga County, New
York.

*In the District Court of the United States, in and for
the Eastern District of Washington, Northern
Division.*

No. ——. IN BANKRUPTCY.

PROOF OF CLAIM.

In the Matter of PRAGER SCHLESSINGER CO.,
Bankrupt.

State of New York,
County of Onondaga,—ss.

At Syracuse, in said County and State, on the 15th day of August, 1913, came T. H. Clere of Syracuse, and made oath and says:

That he is President of the Clere Clothing Company, a corporation, incorporated under the laws of the State of New York, and carrying on business at Syracuse, in the County of Onondaga, in the State of New York, and that he is duly authorized to make this proof;

That the above named bankrupt, the person against whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing

of this petition and is still, justly and truly indebted to the Clere Clothing Company, in the sum of Thirty Thousand Six Hundred Forty Dollars (\$30,640.00) together with interest from May 21st, 1913; that the nature and consideration of said debt is as follows, to wit:

That the Clere Clothing Company at the time of the former bankruptcy of Prager Schlessinger Co. advanced to Prager Schlessinger Co. the sum of Twenty-six Thousand Two Hundred Forty-seven Dollars (\$26,247.00) in order to effect a composition with the creditors of said Prager-Schlessinger Co.; that in consideration of said sum, on the — day of May, 1912, Prager Schlessinger Co., acting by and through its duly authorized officers, sold to the Clere Clothing Company, in bulk, its entire stock of merchandise, furniture and fixtures, which merchandise, furniture and fixtures was estimated to be of the value of approximately Thirty Thousand Dollars (\$30,000); that said merchandise, furniture and fixtures was consigned by the Clere Clothing Company to Prager Schlessinger Co. and was left with said Prager-Schlessinger Co. for the purpose of sale; that thereafter additional merchandise was consigned to the said Prager Schlessinger Co. of the value of Six Thousand Twenty-four & 95/100 Dollars (\$6024.95), as more fully appears from the itemized invoices hereto attached;

That on or about the 25th day of January, 1913, the Clere Clothing Co. submitted a proposition to the bankrupt whereby said Clere Clothing Company offered to sell to the Prager-Schlessinger Co.

in bulk the entire stock of merchandise, furniture and fixtures belonging to the Clere Clothing Co. and in the possession of the Prager-Schlessinger Co., on consignment, for the sum of Thirty Thousand Six Hundred Forty Dollars (\$30,640.00), and said Clere Clothing Company agreed to accept in payment therefor the note of the said Prager-Schlessinger Co., payable on demand; that at a meeting of the Trustees of said Prager-Schlessinger Co., duly called and held, on the 25th day of January, 1913, by a unanimous vote of the Trustees, said proposition was accepted, and the President and Secretary were authorized to execute the Company Note for the sum of Thirty Thousand Six Hundred Forty Dollars (\$30,640.00); that said note was thereupon duly executed and delivered to the Clere Clothing Company, which note is hereto attached and made a part hereof. That demand for payment thereof was made on May 21st, 1913.

That no part of said debt has been paid;

That there are no sett-offs or counter-claims to the same, and that claimant has not, nor has any person by his order, or to the knowledge or belief of said deponent, for claimant's use, had or received any manner of security for said debt, whatever;

That no judgment has been rendered on said debt;

And this deponent further says that this affidavit can not be made by the Treasurer of the Clere Clothing Company because all of the transactions between the Prager Schlessinger Co. and the Clere Clothing Company were carried on by this affiant, and that

this affiant has personal knowledge of said transaction.

T. H. CLERE.

President, Clere Clothing Company.

Subscribed and sworn to before me this 15th day of August, 1913.

[Seal]

JOHN C. BOLAND,

Notary Public.

My commission expires Mar. 30, 1915.

POWER OF ATTORNEY.

To E. H. BELDEN, W. C. LOSEY or H. R. NEWTON: The undersigned, Clere Clothing Company, of Syracuse, in the County of Onondaga, State of New York, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other time and place as may be appointed by the court for holding such meeting or meetings, or at which meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of the undersigned to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in choice of trustee or trustees of the estate of said bankrupt, and for the undersigned to assent to such appointment of trustee, and with like powers to attend and vote at any other meeting or meetings

of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due the undersigned under any composition and for any other purpose whatsoever in the interest of the undersigned with full power of substitution, and the undersigned does hereby revoke any and all prior powers of attorney that may have been given by the undersigned.

In Witness Whereof, the name and seal of the undersigned is hereby affixed the 15th day of August, A. D. 1913.

Signed, sealed and delivered in the presence of
[Seal] CLERE CLOTHING COMPANY.

By T. H. CLERE,
President.

State of New York, County of Onondaga, ss.

BE IT REMEMBERED that on this 15th day of August, 1913, personally appeared before me T. H. Clere, who, being by me first duly sworn, did say that he is duly authorized to execute the foregoing power of attorney in behalf of said creditor, and acknowledged that he executed the said power of attorney for and on behalf of said Clere Clothing Company and to be his free act and deed and the free act and deed of said creditor, and that he is duly authorized to act.

[Seal] JOHN C. BOLAND,
Notary Public in and for the County of Onondaga,
State of New York.

No. 2563. U. S. Circuit Court of Appeals for the Ninth Circuit. Exhibit Original Proof of Claim of Clere Clothing Co. for \$30,640.00. Received Jan. 12, 1915. F. D. Monckton, Clerk.

[Endorsed]: No. ——. Allowed Aug. 25, 1913. S. H. W., Referee. In the District Court of the United States for the Eastern District of Washington, Northern Division. In the Matter of Prager-Schlessinger Co., Bankrupt. Proof of Claim. Clere Clothing Co., amount 30,640 and int. at 8% from May 21, 1913. Filed Aug. 25, 1913, at 10 o'clock A. M. Sidney H. Wentworth, Referee.

[Endorsed]: No. 2563. United States Circuit Court of Appeals, for the Ninth Circuit. Clere Clothing Company, a Corporation, Appellant, vs. The Union Trust & Savings Bank, a Corporation, Trustee in Bankruptcy of the Estate of Prager-Schlessinger Company, a Corporation, Bankrupt, Appellee. In the Matter of the Estate of Prager-Schlessinger Company, a Corporation, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed January 11, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals, for the
Ninth Circuit.*

No. 2563.

In the Matter of the Estate of PRAGER-SCHLES-
SINGER CO., a Corporation,
Bankrupt.

Stipulation.

IT IS HEREBY STIPULATED AND AGREED by and between Belden & Losey, attorneys for the Clere Clothing Co. and Wakefield & Witherspoon, attorneys for the Union Trust & Savings Bank, a corporation, Trustee in Bankruptcy, for the Prager-Schlessinger Co., a corporation, that in the preparation of the transcript of record, by the Clerk of the above-entitled court, all original exhibits shall be excluded therefrom, save and except the two claims filed by the Clere Clothing Co. in the above-entitled action, but that either party to these proceedings, upon the argument thereof, may refer to said original exhibits, the same as though same were included and printed in the original transcript herein.

Dated at Spokane, Washington, this 26th day of January, A. D. 1915.

BELDEN & LOSEY,

Attorneys for Clere Clothing Co.

WAKEFIELD and WITHERSPOON,

Attorneys for Union Trust & Savings Bank, Trustee.

[Endorsed]: No. 2563. In the United States Circuit Court of Appeals, for the Ninth Circuit. In the Matter of the Estate of Prager-Schlessinger Co., a Corporation, Bankrupt. Stipulation. For Omission of Certain Original Exhibits from Printed Transcript of Record. Filed Jan. 29, 1915. F. D. Monckton, Clerk.

IN THE
**United States Circuit
 Court of Appeals**
 FOR THE
NINTH CIRCUIT

CLERE CLOTHING COMPANY, a
 corporation, *Appellant,*

vs.

THE UNION TRUST & SAVINGS
 BANK, a corporation, Trustee in
 Bankruptcy of the Estate of
 PRAGER-SCHLESINGER COM-
 PANY, a corporation, Bankrupt,
Appellee.

IN THE MATTER OF THE ESTATE OF PRAGER-
 SCHLESINGER COMPANY, a Corporation, Bankrupt

*Upon Appeal from the United States District Court
 for the Eastern District of Washington,
 Northern Division.*

BRIEF OF APPELLANT

BELDEN & LOSEY,
Attorneys for Appellant.

CHAS. P. HARRIS,
Of Counsel.

Filed

APR 21 1915

F. D. Monckton,

Clk.

IN THE
United States Circuit
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FOR THE
NINTH CIRCUIT

CLERE CLOTHING COMPANY, a
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THE UNION TRUST & SAVINGS
BANK, a corporation, Trustee in
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Appellee.

IN THE MATTER OF THE ESTATE OF PRAGER-
SCHLESINGER COMPANY, a Corporation, Bankrupt

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.*

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

Pages referred to in this brief refer to pages of the Transcript of Record.

Prager-Schlesinger Company is a corporation organized under the laws of the State of Washington, with its principal place of business at Spo-

kane, Washington, where it has been carrying on its business for a number of years prior to the month of April, 1912.

The Clere Clothing Company is a corporation organized under and by virtue of the laws of the State of New York and doing business in the City of Syracuse, New York.

Prior to the month of April, 1912, the Prager-Schlesinger Company became indebted, in a considerable sum, to the Clere Clothing Company on account of merchandise sold and delivered by the Clere Clothing Company to the Prager-Schlesinger Company, and on account of borrowed money. During the month of April, 1912, the Prager-Schlesinger Company was adjudged a bankrupt by the District Court of the United States, for the Eastern District of Washington, Northern Division. The bankrupt offered a composition which in due course of administration, was accepted by the creditors of the Prager-Schlesinger Company and was afterwards confirmed by the Court. The money to carry out the composition was advanced by this appellant, the Clere Clothing Company, one of Prager-Schlesinger Company's largest creditors at that time, and after the composition had been effected, the Prager-Schlesinger Company's assets were turned over to the Clere Clothing Company.

After the assets of the Prager-Schlesinger Company were turned over to the Clere Clothing Company, the Clere Clothing Company procured the

services of H. L. Gilmore & Company, commercial adjusters of the City of Syracuse, to conduct a sale of the stock.

H. L. Gilmore & Company continued the sale from some time in May, or the first of June, 1912, until about the 31st day of July, 1912. During the time Gilmore & Company was conducting the sale, new goods were shipped by the Clere Clothing Company to replenish the stock to a very considerable amount. After Gilmore & Company had completed their sale in the latter part of July, 1912, there was still on hand, a large amount of merchandise and at that time, an arrangement was made between the Clere Clothing Company, and the Prager-Schlesinger Company by which the latter company was to take over this merchandise on consignment.

For the protection of the Clere Clothing Company, an arrangement was made whereby the stockholders of the Prager-Schlesinger Company delivered to T. H. Clere all the capital stock of the Prager-Schlesinger Company, except one share held by L. A. Schlesinger, and one share held by H. R. Newton. This stock was given to T. H. Clere in trust for the former stockholders, the intention being to permit the old stockholders of the Prager-Schlesinger Company to pay out the indebtedness then due the Clere Clothing Company, and at the same time, give the Clere Clothing Company absolute control of the stock of goods, thus protecting itself on account of the money ad-

vanced to effect the composition, as well as on account of additional stock added to the old stock obtained by the composition order.

The stock then, from the last of July, 1912, until the 25th day of January, 1913, was held by the Prager-Schlesinger Company on consignment, with T. H. Clere holding 498 shares of the capital stock of the Prager-Schlesinger Company, H. R. Newton one share, and L. A. Schlesinger the other share, making the full amount of the capital stock.

About the 25th day of January, 1913, Mr. Clere was in Spokane, and Mr. Schlesinger, who was a large stockholder in the Prager-Schlesinger Company and who had turned over his stock, with the other stockholders, to Mr. Clere, to hold in trust, suggested the purchase of the stock then on hand by the Prager-Schlesinger Company, together with the furniture, fixtures and accounts, etc., and thereupon, an inventory was taken by Mr. Schlesinger, and submitted at a special meeting of the trustees of the Prager-Schlesinger Company, on the 25th day of January, 1913. There were present at this meeting, T. H. Clere, L. A. Schlesinger, and H. R. Newton, all the trustees. At this meeting, the inventory having been submitted, which showed the inventory of stock, etc., at \$30,640, an offer was made by the Prager-Schlesinger Company to buy the stock of merchandise, and to give its demand note in payment, and this offer was accepted by the unanimous vote of the trustees and stockholders, and the demand note evidencing

the purchase by the Prager-Schlesinger Company, payable to the order of the Clere Clothing Company, in the sum of \$30,640, was executed and delivered to the Clere Clothing Company. The sale of this stock of merchandise was thereafter ratified by the proper officers of the Clere Clothing Company at a meeting held in Syracuse, New York.

This note forms the basis of one of the appellant's claims in the present proceedings against the Prager-Schlesinger Company, which has been disallowed by the Referee and the District Court.

After the execution of this note, and after January 25th, 1913, Clere Clothing Company sold outright to the Prager-Schlesinger Company, merchandise of the value of \$1610.67, and this item forms the second claim in dispute herein, claimed to be due by the Clere Clothing Company from the Prager-Schlesinger Company, which claim also was disallowed by the Court, and from which order this appeal is prosecuted.

The business continued after January 25, 1913, under the name of the Prager-Schlesinger Company, until the filing of the voluntary petition in bankruptcy herein, under date of July 14th, 1913, by the Prager-Schlesinger Company, brought about by resolutions of the Prager-Schlesinger Company, Messrs. Clere, Newton and Schlesinger, trustees and stockholders, participating, and at the time of the filing of the voluntary petition in bankruptcy, a receiver was appointed, and after the

proper time had elapsed, an adjudication was made, and a Trustee appointed, since which time the estate has been administered in the usual way.

These proceedings in bankruptcy above referred to were not instituted by the Prager-Schlesinger Company until L. A. Schlesinger, acting on behalf of said company, had gone into the State Court and caused a Receiver to be appointed in these proceedings, which proceedings were had without the knowledge of T. H. Clere, until after his arrival in Spokane, he having been advised that there was trouble in connection with the Prager-Schlesinger Company.

The claims of the Clere Clothing Company were duly filed with the Referee in Bankruptcy and allowed, and thereafter, objections were filed to each of the claims of the Clere Clothing Company, the objections being shown on page 2. A hearing was had and thereafter, the Referee in Bankruptcy handed down his opinion shown on page 8, and thereafter, the Referee made his order disallowing and expunging the claims of the Clere Clothing Company as shown on page 6. An appeal from the order of the Referee was taken by the appellant, and a hearing was had thereon, and thereafter, the District Judge affirmed the order of the Referee, denying said claims and each of them, and expunging same from the list of claims filed in said estate, and from that order, this appeal is taken.

ASSIGNMENTS OF ERROR.

1. The Court erred in finding that the opinion of the referee contained a full and accurate review of the testimony upon the hearing to the objections of the claims of the Clere Clothing Company.

2. The Court erred in holding that the conclusion of the Referee that the bankrupt was a mere agent or instrumentality, through which the Clere Clothing Company transacted its business in Spokane, and that to allow said claim against the bankrupt would be a fraud upon creditors.

3. The Court erred in signing its order and judgment herein complained of, for the reason that said order and judgment is at variance with and not supported by the finding of the Court, in his opinion handed down in said cause.

4. The Court erred in disallowing and ordering expunged the claim of the Clere Clothing Company for Thirty Thousand Six Hundred Forty (\$30,640) Dollars, for the reason that the record does not disclose the fact that said claim was made up of items aside from the purchase price of the stock of goods, transferred by the Clere Clothing Company to the Prager-Schlesinger Company on the date of the execution of the note exhibited in plaintiff's complaint, of \$30,640.

5. The Court erred in disallowing said claim, and based its opinion for so doing, as suggested

in the opinion of the Court, on "strong suspicion," that said claim was made up of items aside from the purchase price of the stock of goods, and not based upon the record or the evidence in the cause.

6. The Court erred in signing said judgment and order complained of, for the reason that said judgment is not warranted by the opinion and findings of the Court herein, but that as shown by the opinion of the Court, same is based not upon fact, but as stated by the Court: "There is a strong probability that this note was given to make the Clere Clothing Company whole on account of its dealings with the bankrupt, and included other items than the single item for goods sold." That if said judgment of the Court was in accordance with the fact, the Court erred in not ordering a hearing to determine what of said whole amount, was improperly charged in said item, and in refusing to allow said claim for the amount less such unlawful items included in said claims, as suggested by the Court.

7. The Court erred in holding that the bankrupt was a "mere agent or instrumentality," through which the Clere Clothing Company acted, and the Court further erred in holding that to allow said claim, or either of said claims of Clere Clothing Company against the bankrupt, would be a fraud against the other creditors.

8. The Court erred in holding and adjudging that that part of the Clere Clothing Company's claim in the sum of \$1610.67 should be expunged

for the reason that there is disclosed from the record, no evidence that said goods were not sold and delivered, as alleged and set out in the claim of Clere Clothing Company, presented before the Referee in Bankruptcy, and for the further reason that the evidence discloses and shows conclusively that the items going to make up said sum of \$1610.67 was sold and delivered in the usual course of business.

ARGUMENT.

The District Court in passing upon the order of the Referee on review, in the course of his opinion suggests:

“An examination of the entire testimony leaves a *strong suspicion* that the promissory note of \$30,640 was made up of items *aside from the purchase price* of the stock of goods transferred on the date of the execution of the note. In other words, there is a *strong probability* that this note was given to make the Clere Clothing Company whole on account of its dealings with the bankrupt and included other items than the single item for goods sold. But if I am correct in this conclusion it would only be ground for reducing the amount of the claim and would not justify its entire rejection. The other question presented by the objections is by no means free from difficulty. But while the two corporations were separate and distinct, I am by no means satisfied that the referee erred in his conclusion that the bankrupt was a mere agent or instrumentality through which the claimant transacted its busi-

ness here and that to allow these claims against the bankrupt would be a fraud upon other creditors.”

Was the Court warranted in his conclusion as shown by the record, and is a “*strong suspicion*,” or a “*strong probability*” sufficient ground for the trial Court to expunge a claim in bankruptcy? The law is well settled that where a claim has been duly presented by a creditor in due form and allowed, the duty rests upon the objecting Trustee to produce evidence, the probative force of which shall be equal to or greater than the evidence offered by claimant.

Whitney vs. Dresser, 200 U. S. 352; s. c. 50 L. Ed. 584.

The Court in his opinion suggests there is a *strong suspicion* that the note for \$30,640.00 was made up of items aside from the purchase price of the stock of goods transferred, but from the entire evidence, in view of the testimony of the three witnesses referred to hereafter, we would like to inquire what these items were, and would suggest to opposing counsel in their brief they point out to this Court what these items were, and point out also testimony whose probative force is equal to or greater than the testimony of the three witnesses who testified positively as to the consideration for the note.

The trial Court found that the two corporations were separate and distinct, but suggests that he was by no means satisfied that the Referee erred

in his conclusion that the bankrupt was a mere agent or instrumentality through which the claimant transacted its business, and finally concluded that it would be a fraud upon the other creditors to permit the allowance of the claim of the Clere Clothing Company. It would seem to us therefore, that upon the face of the opinion of the trial Court, the opinion of the Referee should have been set aside, and this claim allowed. Claims are not expunged or disallowed because of "strong suspicion" or "strong probability," but proof is necessary.

There is on behalf of claimant, Clere Clothing Company, the direct and positive testimony of three witnesses. The testimony of T. H. Clere is to the effect that at the time the note in question was executed, an inventory of the stock of the Prager-Schlesinger Company had been prepared and was then before the meeting, and that the inventory showed the sum of \$30,640, being the amount for which the note was given (page 120). The testimony of H. R. Newton (page 99) is to the effect that the inventory which had been prepared, and was exhibited on the date the note in question was executed, showed there was merchandise on consignment belonging to the Clere Clothing Company in the sum of \$30,640. The testimony of E. H. Belden (page 106), is to the effect that at the time the note in question was executed, the inventory previously taken was before him; that he prepared the note and that the note is in

his handwriting, and that the amount of the note was taken from the inventory then before him. There is therefore, the positive and direct testimony of three witnesses to this transaction, all to the effect that at the time T. H. Clere came to Spokane, a day or so prior to the execution of the note in question, L. A. Schlesinger, of the Prager-Schlesinger Company, who had been manager of the Prager-Schlesinger Company, had taken an inventory of the stock, furniture, and fixtures, and that this inventory totalled \$30,640. It was therefore agreed between the parties, that the stock of goods should be sold on that basis, and the note was given in conformity with the resolutions passed by the respective parties. Can there be any question under all these circumstances, that the note for \$30,640 was given for the purchase price of the stock of goods, wares, merchandise, furniture and fixtures, and perhaps the open accounts, all of which was represented by this inventory? With the above evidence and no other evidence, it must be plain to the Court that this claim should be allowed.

As against the direct and positive testimony of the three witnesses above, we have the testimony of Mr. Nuzum. It appears from the record (page 81), that Mr. Nuzum was the attorney for S. S. Prager and Clara Prager, his wife, and that he had brought two actions in the Superior Court of Spokane County to recover the sum of about \$15,000 for stock; that is, stock in the corporation

which they claimed was held in trust by the Clere Clothing Company for them. It appears further on page 82, of the record, that in one of those cases, Mr. Nuzum had procured the appointment of a Receiver in the State Court, prior to the bankruptcy proceedings. In his testimony Mr. Nuzum attempts to detail some conversations had with Mr. Clere and others, and gives as his recollection only, that the inventory was given at something like \$27,000. Further, on page 83, Mr. Nuzum testified: "I don't remember how much merchandise the inventory showed that the Clere Clothing Company had there. I wanted to get the total inventory to show the amount of the note. I understood that this was all the merchandise of the Clere Clothing Company, because they claimed this note was the note for it. I could not tell you what the inventory showed. I know it totaled \$27,540.90. Schlesinger got up some memoranda so that we could talk to Clere."

On page 75, Mr. Nuzum states that the inventory in question was last traced to his office. He states that the inventory was in his office, and that he had seen it, and he thinks he gave same to Schlesinger. In view of Mr. Nuzum's testimony, does it not seem singular that so important an instrument as this inventory should get out of his possession, and is the testimony of Mr. Nuzum, given from memory, and considering his connection with this case, entitled to the same weight as that of the positive and direct testimony of three wit-

nesses who were in an absolute position to know exactly what the facts were?

It would appear, however, even from the testimony of Mr. Nuzum, that the stock of merchandise was perhaps inventoried at \$27,000, to which add the furniture and fixtures, and the bills and accounts receivable, and no doubt same would total the sum of \$30,640, notwithstanding the different constructions which Mr. Nuzum would have placed on this inventory, and his inability to produce same or account for its loss, at the time of the trial. Notwithstanding Mr. Nuzum's testimony (page 86), does it not appear strange that this inventory was not turned over to the Receiver in the State Court prior to the institution of the bankruptcy proceedings? Mr. Nuzum suggests that he never thought about turning the inventory over to the Receiver, though the Receiver had been appointed at the time he gave the inventory to Schlesinger.

The testimony of Nuzum is not only contradicted by the direct testimony of Belden and Clere, but also by the circumstances. If the amount of the note was arrived at, as claimed by Nuzum, why was there any necessity of taking an inventory prior to the meeting on the 25th of January, 1913? If the amount of the note was arrived at as detailed by Nuzum, the Court must conclude that Schlesinger, Clere, Belden and Newton deliberately falsified the records of Prager-Schlesinger Company when the resolution was adopted authorizing

the execution of the corporate note by the Prager-Schlesinger Company.

Aside from this testimony, there is the testimony of the expert, one Josiah Richards (page 87), who examined the books. His testimony is interesting because of the theories advanced, and the absence of any real information he discloses in his report. It is no doubt true, as we think is fairly well indicated by the testimony of Richards, that he was unable to tell anything about these books. The facts are, as disclosed by the record, that the books were very poorly kept; in fact, they would hardly constitute what could be termed a set of books, but there can be no deduction made from the testimony of Richards, that the inventory did not show there was \$30,640 worth of goods in the place. It will be remembered as disclosed by the record, that T. H. Clere had given the entire management of this business over to L. A. Schlesinger, and that Clere had no direct knowledge of just how the business was being conducted in Spokane, since he had so much confidence in Schlesinger. Clere resided in Syracuse, New York, and did not give the business in Spokane any time or attention, after having conveyed same for the Clere Clothing Company to the Prager-Schlesinger Company. In fact, the record discloses that from the date of the sale until the bringing of the suits in the State Court, through which a Receiver was appointed, just prior to the bringing of these bankruptcy proceedings, Clere was not in Spokane.

As to whether the inventory taken at the time the note was given was a correct inventory or not, it would be difficult to state, but the record does show that as far as the entire transaction was concerned, the inventory as presented by Schlesinger, was accepted by Clere as a true inventory, and Clere acted upon that inventory in the acceptance of the note for \$30,640 as the purchase price for their stock, which had been held by the Prager-Schlesinger Company on consignment prior to the sale. If Schlesinger had taken a false inventory, Clere was not a party to that, and as far as is disclosed by the record, relied solely upon the inventory.

As to the second claim of \$1610.67, there is no evidence whatever that this balance was not due for goods sold by the Clere Clothing Company to the Prager-Schlesinger Company. We submit, therefore, that unless it should be found by this Court that the course of conduct between the Clere Clothing Company and the Prager-Schlesinger Company was sufficient to constitute a fraud, these claims should be allowed in full, and the finding of the Referee and the District Judge set aside.

What were the transactions here that constituted a fraud? It is true that the Clere Clothing Company or Mr. Clere held all the capital stock of the Prager-Schlesinger Company to whom they had sold their stock of merchandise, but that of itself would not constitute a fraud. In fact, it occurs to us it would show a well figured business propo-

sition. The Clere Clothing Company might have taken a mortgage back on the stock to secure the payment of the note for \$30,640, but we submit that under the arrangement worked out in this case, the protection of the Clere Clothing Company was better insured through the arrangement by which Clere held the capital stock of the Prager-Schlesinger Company, together with control on the Board of Trustees, than through the taking of a chattel mortgage. Had a chattel mortgage been taken, there could have been no question raised, and it is a little beyond our power of reasoning or deduction to understand how the Referee and trial Court reasoned that the Clere Clothing Company was a party to a fraud.

The trial Court says: "but while the two corporations were separate and distinct, I am by no means satisfied that the Referee erred in his conclusion that the bankrupt was a mere agent or instrumentality through which the claimant transacted its business here." Does the mere fact that Clere or the Clere Clothing Company held for their security or protection, the capital stock of this corporation, indicate or prove or establish in any way, that the Prager-Schlesinger Company was the agent of the Clere Clothing Company? The entire record discloses that prior to January 25th, the date of the execution of the note, the stock of merchandise was held by the Prager-Schlesinger Company on consignment, and the testimony likewise discloses that after that date, the property was

treated as having been sold by the Clere Clothing Company to the Prager-Schlesinger Company, and the two corporations after January 25th, were dealing with each other the same as the Prager-Schlesinger Company was dealing with any of its other creditors from whom it purchased goods.

The uncontradicted testimony of Clere and Newton shows that the certificates of stock of the Prager-Schlesinger Company were transferred to Clere and Newton in trust for the former stockholders, the purpose at all times being to protect the Clere Clothing Company and to insure the honesty of L. A. Schlesinger in the conduct and management of the Prager-Schlesinger Company's business. This stock was the basis of the suit brought in the State Court by Nuzum, referred to heretofore. It was understood that when the indebtedness to the Clere Clothing Company was paid off, this stock in the Prager-Schlesinger Company was to be transferred to the *cestuis que trustent*. The situation would have been practically the same had the stock remained in the name of the former stockholders, and a power of attorney had been given to Clere to vote the stock at the meetings of the trustees. It seems to us that this transfer of the capital stock in trust, was perfectly proper and legitimate, in view of the fact that Clere Clothing Company had on consignment with the Prager-Schlesinger Company, a large amount of merchandise and that the place of business of the Clere Clothing Company was thousands of miles away

from Spokane. Naturally the Clere Clothing Company was anxious that the stock of goods be managed honestly by the consignee, and in case the consignee did not act fairly and honestly, the Clere Clothing Company desired to be in a position where the manager of the Prager-Schlesinger Company could be removed without the necessity of litigation.

It is an elementary principle of law that a corporation is a legal entity, separate and distinct from the stockholders composing it. The Legislature of the State of Washington has provided that one corporation may hold stock in another corporation and while the Clere Clothing Company did not own any stock in the Prager-Schlesinger Company, we submit that if it had held stock in the Prager-Schlesinger Company, the second objection of the Trustee would not be a valid one.

The Referee in his opinion (page 26), says: “* * * that the Clere Clothing Company simply conducted a branch of its business in Spokane under the name of the Prager-Schlesinger Company, and endeavored to work the machinery of the Prager-Schlesinger Company, a corporation, in such a manner, that if the business failed the creditors, and not the Clere Clothing Company, would be the principal loser.” It seems to us that after a consideration of the entire record, this finding is entirely unwarranted. In case the claims of the Clere Clothing Company should be allowed, they would fare in the bankruptcy proceedings,

the same as all other creditors of the Prager-Schlesinger Company. It is not claimed that the Clere Clothing Company has a preference, and it is not seeking to establish a preferred claim in the bankruptcy proceedings, and after the giving of this note, there is no testimony to the effect that the Prager-Schlesinger Company was in any way acting as the agent for the Clere Clothing Company. The fact is undisputed that this stock in the Prager-Schlesinger Company was held by Clere individually though possibly the legal effect of his holding this stock would be that he was holding same in trust for the Clere Clothing Company, as well as for the stockholders of the Prager-Schlesinger Company, but that would in no way establish or create an agency. In fact, it is doubtful whether or not in law, it could be considered that Clere was holding this stock in trust for the Clere Clothing Company.

We call the Court's attention to the case of *In re Hudson River Elec. Power Co.*, 173 Fed. 934. The Hudson River Power Transmission Co. was a corporation organized for the purpose of generating electrical power. The Hudson River Elec. Power Co. was a corporation organized for practically the same purpose. The stock of the Hudson River Transmission Co. was owned by the Hudson River Elec. Power Co., whose officers managed it and its business. A petition in bankruptcy was filed against the Hudson River Transmission Co., one of the petitioning creditors being Ludlow Valve

Mfg. Co. The petition was contested on the ground that the Ludlow Valve Mfg. Co. was not a creditor, and that the merchandise in question was sold to the Hudson Elec. Power Co. and not to the Transmission Co. In discussing the proposition, after reviewing the facts, the Court said:

“The one corporation was not the agent of the other * * * neither did the fact that the one corporation exercised a controlling influence over the other through the ownership of its stock or through the identity of stockholders operate to make either the agent of the other, or to merge the two corporations into one.”

A case which seems to us to be parallel to the case at bar in *In re Watertown Paper Co.*, 169 Fed. 252 C. C. A. The facts in this case are as follows: The Watertown Paper Co. is a corporation organized in 1864, with a capital of \$20,000 for the manufacturing of paper. Its stock was held by Hiram Remington, Edward Remington, and their children. The Pulp Company was a corporation organized in 1887 by the same parties, and the capital stock was paid for with profits coming to the stockholders of the Paper Co. A petition in bankruptcy was filed against the Paper Co. and the Pulp Co. presented a claim for a large sum as a creditor. The affairs of the two corporations were closely intermingled; the corporations gave each other commercial paper and endorsed for each other. Separate books of account were kept for the two corporations, but the business of each was conducted from the office of the Paper

Co. The Pulp Co. had no bank account, all of its bills being paid by the Paper Co. and charged to its account, and all credits of the Pulp Co. were collected by and credited to the Paper Co.

“The case thus presented is one in which the stockholders of two corporations are largely the same, in which both corporations have been under the same management, and in which their affairs have for years been involved and intermingled; and the legal question is whether these relations prevent the one corporation from enforcing against the bankrupt estate of the other a claim which, in case the the latter corporation had remained solvent, would have been both valid and enforceable. *It must be clearly borne in mind that this is not a case in which a creditor is suing a corporation upon the ground that it has so held itself out in connection with another corporation as, upon principles of estoppel, to render it responsible for a particular debt of the latter.* Any legal principle which would prevent the Pulp Company from collecting its claim from the estate of the Paper Company would permit all the creditors of the Paper Company to look to the Pulp Company for the payment of their demands — would, in effect, extend the jurisdiction of the bankruptcy court over the Pulp Company’s property.

Now, it is an elementary and fundamental principle of corporation law that a corporation is an entity separate and distinct from its stockholders and from other corporations with which it may be connected. The fact that the stockholders of two separately chartered corporations are dentical, that one owns shares in another, and that they have mutual dealings, will not, as a general rule, merge them into one corporation, or prevent the enforce-

ment against the insolvent estate of the one of an otherwise valid claim of the other. As said by the Supreme Court of Arkansas in *Lange vs. Burke*, 69 Ark. 85, 88, 61 S. W. 165, in holding, in a case where two corporations were practically controlled by the same stockholders and had had intimate business relations, including the employment of the same bookkeeper, that a claim of one corporation would be enforced against the insolvent estate of the other:

‘A corporation is an artificial being, separate and distinct from its agents, officers and stockholders. Its dealings with another corporation, although it may be composed in part of persons who own the majority of the stock in each company, and may be managed by the same officers, if they be in good faith and free from fraud, stand upon the same basis, and affect it and the other corporation in the same manner and to the same extent, that they would if each had been composed of different stockholders and controlled by different officers.’

And as said by the Circuit Court of Appeals for the Sixth Circuit in *Richmond, etc., Const. Co. vs. Richmond, etc., R. Co.*, 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625:

‘The contract company was a legal corporation, wholly distinct and separate from the railroad company. The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other, through the ownership of its stock or through the identity of stockholders, operate to make either the agent of the other, or to merge the two corporations into one.’ ”

We have quoted somewhat at length from the above case, as the facts therein, and the holding of the court seems to be particularly pertinent to the case at bar.

We submit from the suggestions above made, and from the entire record in this case, that the judgment of the lower Court should be reversed, and each of the claims of claimant allowed.

Respectfully submitted,

BELDEN & LOSEY,

Attorneys for Appellant.

CHAS. P. HARRIS,

Of Counsel.

No. 2563

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

CLERE CLOTHING COMPANY, a
corporation,

Appellant,

vs.

THE UNION TRUST & SAVINGS
BANK, a corporation, Trustee in
Bankruptcy of the Estate of
PRAGER-SCHLESINGER COM-
PANY, a corporation, Bankrupt,

Respondent.

Filed

MAY 6 - 1915

F. D. Monckton,
Clerk.

In the Matter of the Estate of Prager-Schlesinger
Company, a Corporation, Bankrupt.

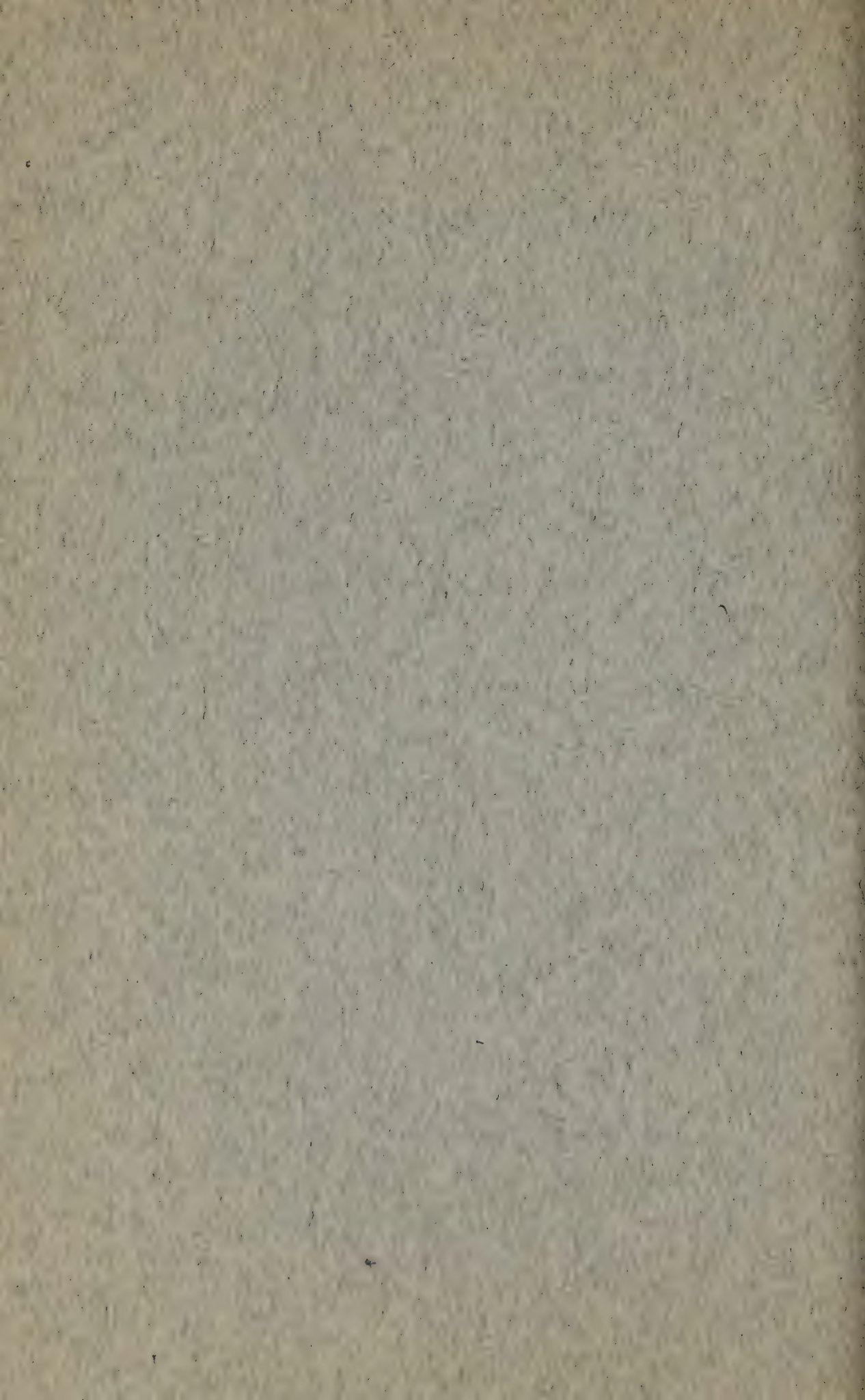
*Upon Appeal from the United States District
Court for the Eastern District of Wash-
ington, Northern Division.*

BRIEF OF RESPONDENT.

WAKEFIELD & WITHERSPOON

Attorneys for Trustee.

Spokane, Wash.



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BRIEF OF RESPONDENT.

ARGUMENT.

(References are to pages in the Transcript, un-
less otherwise indicated.)

The earliest important event in the career of the
Prager-Schlesinger Company as far as this con-

troversty is concerned was the composition in May, 1912, which closed the first bankruptcy. The statement at page 2 of appellant's brief states acceptably to the trustee the situation as it was then: "The money to carry out the composition was advanced by this appellant, the Clere Clothing Company, one of Prager-Schlesinger Company's largest creditors at that time, and after the composition had been effected, the Prager-Schlesinger Company's assets were turned over to the Clere Clothing Company." There can be no dispute that after the composition the Clere Clothing Company had title to and possession of all the property and assets of the Prager-Schlesinger Company and was running a retail clothing business in Spokane under the Prager-Schlesinger Company's name. It is our contention that that state of facts never changed from that day until the final closing of the business and the adjudication in the present bankruptcy.

The appearance of the Gilmore Company in the early summer of 1912 is immaterial. They were only sales conductors in behalf of the Clere Clothing Company, as the record very clearly shows, and as was formally admitted by counsel (page 94, line 8).

If the Prager-Schlesinger Company ever became rehabilitated as an independent concern, the change occurred either at the time of the departure of the

Gilmore Company, or at the time of the alleged sale on January 25, 1913.

Consider, in the first place, what is shown by the books of the Prager-Schlesinger Company. Mr. Josiah Richards, whose qualifications as an expert accountant were admitted by appellant, testified that the books show no evidence of change in ownership of the business from the time the Clere Clothing Company took charge of it in June, 1912, until the last entry in the books in July, 1913: "I will say the books indicate that there was no change during the period from June 1st to the last entry in the books in July, 1913; that is, from June 1st, 1912, the accounts continue during the entire time. There are no closing entries. There was no inventory taken. There is no record of any bills payable in the books which would indicate a sale. Every account continues during this period without having been closed" (pages 90-91).

Similarly, the bank account remained the same. Mr. Child, Vice-President of the National Bank of Commerce, states (page 45) that at all times from the time the account was opened in 1912 until it was closed in 1913 it was always carried as the Clere Clothing Company account; that there was no change nor any direction to make a change; that it was operated under the bank's understanding with Mr. Smith, Secretary and attorney of the

Clere Clothing Company. The only reason the bank had, he says, for carrying the account in the name of the Clere Clothing was that they were "the only people we had any business with" (page 48).

There are certain minor practices connected with the bookkeeping and the financial operations which tend toward the same conclusion. For instance, it is Mr. Clere's testimony (page 134) that the Clere Clothing Company was in the habit of using the accommodation notes of the Prager-Schlesinger Company at a time when, according to his testimony, practically nothing was owed. More suggestive still is the fact that even after the purported sale of January 25, 1913, the Prager-Schlesinger Company was paying to the National Bank of Commerce interest upon notes owed there by the Clere Clothing Company and charging such payments to expense; the interest items were charged as an expense against the business, as stated by Mr. Richards (page 95), in exactly the same method as they would have been charged if the Clere Clothing Company were owning and operating the business. Mr. Child testified to the same effect: "Interest was paid by the business here in Spokane that was conducted under the name of the Prager-Schlesinger on these notes from time to time. Up to some time in June, 1913, in the spring, Clere quit paying and then

is when I called the loan. I think a great many of the principal payments were made on these notes through this Prager-Schlesinger business" (page 47). Even as late as June 27, 1913, the Secretary of the Clere Clothing Company wrote to Schlesinger complaining that that month's interest on the Clere Clothing Company's loan at the National Bank of Commerce had not been paid (Trustee's Exhibit 19).

Mr. Yeomans, Credit Manager for the Spokane Dry Goods Company, testified (page 56) that from May or June, 1912, until June or July, 1913, the Spokane Dry Goods Company continued to deliver goods at the Prager-Schlesinger Company store, handling the account at all times as the Clere Clothing Company account. At page 57 he testified that the Spokane Dry Goods Company had obtained judgment against the Clere Clothing Company in a suit upon this account. That case has since been appealed to the Supreme Court of the State of Washington and affirmed. A portion of the opinion of the Washington Court is hereinafter quoted, as an authority upon the question of law involved in this controversy.

More convincing to our mind, however, even than the fact that the books show no change in the ownership of the business, more convincing than the fact that the bank account remained throughout as

the Clere Clothing Company's account, or than any of the other circumstances shown by the record, is the fact that there was no separate capital put into the Prager-Schlesinger Company after the former bankruptcy. When the Clere Clothing Company, by Thomas H. Clere, acquired the certificates of stock of the Prager-Schlesinger Company those certificates represented an empty name. The Prager-Schlesinger Company had just gone through bankruptcy and had been divested of every dollar of its assets. The bankruptcy of the corporation had worked a practical dissolution. This fact more than anything else stamps the concern as a dummy corporation. Its business career was closed, like that of the Missouri Company described by the Court in *Glidden & Joy Varnish Co. v. Interstate Nat. Bank* (1895), 69 Fed. 912:

“It is indisputable, from the evidence, that after the sale of its property to the Ohio company, and the cancellation of all its stock, except a nominal sum, ‘to keep alive’ its charter, the Missouri company did no business in Kansas City or elsewhere. It had no property, no capital, no credit, and no manager. The business at Kansas City, from and after the date of this transaction, was the business of the Ohio company, and was conducted by Dudley, as its manager. After that time, Dudley was the manager of the Ohio company. That company fixed and paid his salary as manager, and it was to that company that he made his reports and returns. After the sale of its property and the cancellation of its

stock, the Missouri company was nothing more than a dummy. It had probably a technical legal existence through the three shares of uncanceled stock held by the Ohio company, not as capital stock for any business purposes, but 'in trust to keep alive the charter' of the company. Its business career was closed. If not dead, it was in a comatose condition, closely bordering on death. It remained in this condition until 1893. In that year it was discovered that the Kansas City branch of the Ohio company, owing to the general depression in business then prevailing throughout the country, or to the mismanagement or dishonesty of Dudley, or from some other cause, was so much involved that its assets were probably insufficient to pay its debts. * * *

It cannot, when it is prosperous, claim the Kansas City business as its own, and, when it is unprofitable, claim that it is the business of the Missouri company. The law will not countenance any such thimblerrigging. One corporation cannot avoid the payment of its just obligations by putting forward as the debtor another corporation, similar in name, which, if it has a legal existence at all, exists only in name, and as a mere dummy or scapegoat for the debtor corporation. * * *

Its liability is grounded on the fact that after the sale of its stock and property to the Ohio company the Missouri company went out of business, and that thereafter the Ohio company owned the property, and conducted the business through its manager, Dudley."

The claim of the Clere Clothing Company is founded upon the action taken at the meetings held in Belden & Losey's office on the evening of

January 25, 1913. The vital question in this controversy is whether or not at that time and place there was a fair and square sale of \$30,640 worth of merchandise and fixtures by one *bona fide* corporation to another. Mr. Clere states: "At that meeting we had a discussion of the proposition and went over it" (pages 120-121). The minutes of the special meeting of the trustees of the Prager-Schlesinger Company (see Exhibit) show that the Board of Trustees, to-wit, T. H. Clere, L. A. Schlesinger and H. R. Newton, met at 7:30 p. m. on Saturday, January 25, 1913, and that Mr. Clere presented to the Board an offer to sell or dispose of the entire stock of furniture and fixtures belonging to the Clere Clothing Company, to the Prager-Schlesinger Company for the sum of \$30,-640, and it is stated that the question was discussed and after a consideration, accepted. Ten minutes later, at 7:40 o'clock p. m., there was held a special meeting of the stockholders of the same corporation, the entire list of stockholders being represented, to-wit, T. H. Clere, L. A. Schlesinger and H. R. Newton, and by them the sale was ratified. That was not a transaction that can prevail against the rights of genuine creditors. It was not the case of one corporation offering to buy the stock of another and the other company accepting such offer and ratifying the acceptance by a stockholders' meeting; it was the case of Thomas H. Clere making the offer on behalf of the Clere Clothing

Company, and then convening as the Board of Trustees of the Prager-Schlesinger Company and proposing, considering, discussing and accepting the offer, and then convening as the stockholders of the Prager-Schlesinger Company and ratifying the transaction, all within the course of ten minutes. It was, as Mr. Clere said, "a case where a man could give anything he wanted for a stock of goods" (page 74).

Even after this transaction there was no visible change in the condition of the business. No bill of sale was taken. No entry of the transaction was made in the books. All accounts continued as before. The account at the bank was still the account of the Clere Clothing Company. Even the Clere Clothing Company continued to the last to ship goods from Syracuse to the Clere Clothing Company at Spokane (see middle of page 94). The testimony all shows that there was no change in the constitution or business dealings of the thing doing business as the Prager-Schlesinger Company from the time of the composition in 1912, when the stock was transferred to the Clere Clothing Company, until June, 1913, when the concern went into bankruptcy for the second time. The same Trustees (Schlesinger absent) threw the company into the second, voluntary bankruptcy (pages 69, 135).

In replying to appellant's argument let it be

observed at the beginning that the appellant is rather too greatly excited over certain language used by the District Judge in his memorandum of decision. This appeal, it should have been remembered by appellant, did not lie from the court's memorandum, but from the order shown at page 28, which recites:

“And the court having heard the argument of counsel and examined the entire testimony and record in the case, and being of the opinion that the opinion of the referee contains a full and accurate review of the testimony; and that the conclusion of the referee that the bankrupt was a mere agent or instrumentality through which the claimant transacted its business in Spokane and that to allow said claims against the bankrupt would be a fraud upon creditors, is in accordance with the law and the evidence in this case, now, therefore, it is ordered, adjudged and decreed that the order of the referee denying said claims and expunging same from the list of claims filed herein be and it is hereby affirmed.”

Furthermore, the expressions in the memorandum which shock the appellant are expressions made with respect to that branch of the case upon which the court did not rest its decision. As the court said, if he was correct in his conclusion as to the items included in the \$30,640 it would only be ground for reducing the amount of the claim. The court, however, entirely rejects the claim and puts his decision upon the ground that the bank-

rupt was a mere agent or instrumentality of the claimant, or to put it exactly, that he was by no means satisfied that the referee erred in his conclusion to that effect. Appellant's objections, therefore, are directed against the memorandum rather than the judgment from which it appealed, and, besides, are directed against that branch of the case upon which the court found it unnecessary to express an opinion.

Hence the challenge by appellant that we name the suspicious items in the \$30,640 note might well be disregarded. We are glad, however, to point out what they were—not simply for their value in showing that the note was without consideration to that extent, but because the very ability of the Clere Clothing Company to obtain a purported obligation of the Prager-Schlesinger Company which was half made up of debts which could not possibly be the debts of anybody except the Clere Clothing Company itself, shows that the Clere Clothing Company and the Prager-Schlesinger Company were the same; that there was nobody in the Prager-Schlesinger Company whose interests were adverse to the interests of the Clere Clothing Company; that whether the debts of the Clere Clothing Company or the debts of the Prager-Schlesinger Company were being paid was all one and the same to everybody concerned. The testimony of Mr. Clere, particularly at pages 130 and

131, and the testimony of Mr. Nuzum beginning at page 73, and Exhibits 17 and 18 in the handwriting of Mr. Schlesinger, the person who, as the claimant alleges, took the inventory, establish in our judgment that the note was not given for the actual value of the stock of merchandise, but was given for the amount which the Clere Clothing Company had "invested" in Spokane; "the amount," as Mr. Clere states at page 130, "that was due the Clere Clothing Company; the amount they had invested out there."

These exhibits show that the following items, approximately, were included in the \$30,640 note:

(1) \$4272.20 paid to the Exchange National Bank in addition to its dividend under the composition. Mr. Cohn's testimony at page 41 and the testimony of Mr. Coman beginning at page 58, show that the bank received an additional \$4272.20. This was not due from the Prager-Schlesinger Company because the composition had discharged the Exchange National Bank's claim against it.

(2) \$4736.02, the extra amount necessary to satisfy the claim of the Clere Clothing Company in the first bankruptcy in full (see testimony of Mr. Clere, pages 130-131). This amount was not owing by the Prager-Schlesinger Company for the same reason.

(3) Amounts of \$500 to Levy of the Credit

Clearing House; \$1890 to Thomas K. Smith and \$450 to Danziger, the Clere Clothing Company's attorneys; and \$800 to Thomas Clere, incidental expenses in connection with the composition of 1912, in all amounting to \$3640. These amounts were payable by the Clere Clothing Company; not by the Prager-Schlesinger Company unless they were one and the same (see testimony of Mr. Nuzum at page 79; that of Mr. Clere at page 133).

(4) \$3500, approximately, paid to the Clere Clothing Company by the dividend checks of other creditors. It would be inequitable to allow the Clere Clothing Company to receive the benefits of these checks because they were preferential payments made for the purpose of effecting the composition (see testimony of T. T. Grant beginning at page 52; that of Mr. Cohn at page 40; and that of Mr. Nuzum at page 76).

About the same result is reached in approaching the case from another point of view. The testimony of Mr. Richards shows that in June, 1912, the stock of merchandise was put upon the books at \$40,000. It is evident from Mr. Clere's own statement at page 117 that the stock was overvalued \$10,000; that its actual value was not over \$30,000. The book value of the merchandise on January 25, 1913, the date of the sale, was \$25,007, which amount represents a continuation of the original amount of \$40,000, plus the additions to

the stock and less the depletions from sales. The true value of the merchandise on January 25, 1913, was therefore about \$15,000 instead of \$25,007 (see testimony of Mr. Richards at page 92).

If the evidence just reviewed is sufficient to justify the conclusions that the promissory note was made up of items aside from the purchase price of the stock of goods, it is very good evidence in support of all the other facts and circumstances which have led the Referee, the District Court and the Supreme Court of Washington, to decide that the Prager-Schlesinger Company had no separate existence.

It strikes us that appellant's counsel makes rather a damaging admission at the bottom of page 3 of his brief, in stating that the stock-certificates were taken over by the Clere Clothing Company for the purpose of "protecting itself on account of the money advanced to effect the composition." Had the composition been as faultless as the purported sale of 1913, the Clere Clothing Company would have advanced only what the stock was worth, and no further "protecting" would have been necessary. When, let us ask, did the Clere Clothing Company cease to be "protecting itself on account of the money advanced to effect the composition?" When did it decide to be contented with the value of the stock of goods?

Surely it is singular that the inventory claimed by the appellant to have been taken, and the memorandum from which the trustee claims the amount of the note was derived, foot up in exactly the same amounts. Mr. Belden recollects that the note was made up from a document before him showing a total of \$30,640; it seems most reasonable to conclude that he was looking at the memorandum which was preserved and is before the court as an exhibit, rather than at the inventory which nobody has been able to find. Mr. Belden would charge the loss of the inventory to Mr. Nuzum, quoting Mr. Nuzum as stating that he "thinks he gave same to Schlesinger." In Mr. Nuzum's testimony at page 75 Mr. Nuzum doesn't "think"; he is quite positive: "I know Schlesinger took it."

We also disagree with appellant's characterization of the testimony of Mr. Clere as being direct and positive to the effect that the note was given for the purchase price of the stock. Appellant must refer only to Mr. Clere's direct testimony; not to his answers on cross-examination. As the referee observes at page 23: "Clere's testimony on this subject is damaging. While answering the leading questions of his attorney, Thomas K. Smith, he makes a good witness for the claimant. When cross-examined by Mr. Nuzum he was evasive, showing a surprising lack of memory of

things that a man in his position would naturally know something about and remember, especially things that would hurt his side of the case, and at least leads me to suspect that more than the stock and fixtures was taken into consideration in figuring the amount of the note." In his cross-examination Mr. Clere admits: "Yes, there was a memorandum used. We did have a memorandum which showed the figures which we claimed the Clere Clothing Company was out or had invested" (page 131).

Nor do we agree with the statement in appellant's brief at page 14 that in agreeing with the trustee's claims the court must conclude that the records of the Prager-Schlesinger Company were falsified. By the adoption of the resolution authorizing the execution of the note, the Prager-Schlesinger Company could pay \$30,640, if it chose, for the stock; but if it paid more than the fair market value that fact would compel the *pro tanto* reduction of the vendor's claim in bankruptcy and is also, we believe, excellent evidence that the buying corporation was completely dominated by the other.

At page 15 of its brief appellant seeks to detract from the value of the testimony of Mr. Richards, expert accountant, by asserting that the books were very poorly kept. There is nothing in the record to indicate that the books were not well kept. But

assuming that they were not, that would be no answer to such facts as the following, which the books affirmatively show: That the Clere Clothing Company as late as February 4, 1913, was billing its shipments to the Clere Clothing Company at Spokane; that the business was paying interest upon the Clere Clothing Company's indebtedness to the bank and charging the payments to expense; that there were no closing entries either at the time the Gilmore Company withdrew or at the time the purported sale was made; and even a poor bookkeeper would make an entry of a purchase of \$30,640 worth of merchandise or the giving of a \$30,640 promissory note.

In discussing the law of the case counsel for appellant presents his argument as though there were no other significant circumstance than the manner in which the certificates of stock of the Prager-Schlesinger Company were held. "It is true," he states at the bottom of page 16 of appellant's brief, "that the Clere Clothing Company of Mr. Clere held all the capital stock of the Prager-Schlesinger Company to whom they had sold their stock of merchandise, but that of itself would not constitute a fraud," and again near the bottom of page 17 he asks, "Does the mere fact that Clere or the Clere Clothing Company held for their security or protection, the capital stock of this corporation, indicate or prove or establish in any way,

that the Prager-Schlesinger Company was the agent of the Clere Clothing Company?" The trouble with this analysis of the situation is that it takes into consideration only one of many facts. Consequently we have no quarrel with appellant's quotation from *In re Hudson River Electric Power Company*.

The case, also, of *In re Watertown Paper Company* is widely different from the case at issue. The stockholders were largely the same; the business of the Pulp Company was conducted from the office of the Paper Company, a certain portion of the office expense being charged to the Pulp Company; the two corporations were largely under the direction of the same officers; one company purchased practically the entire output of the other. But here the resemblance ends. The business of one company was not at the outset the business of the other. The business of the Prager-Schlesinger Company was at one time, just after the composition, the Clere Clothing Company's business, and it is impossible to discover when that fact was ever changed. The vital difference, however, between the two cases is this: The Pulp Company had valuable assets of its own represented by a paid-up capital stock held upon a dividend-getting basis. The Prager-Schlesinger Company on the other hand had been stripped of every dollar of its assets; it had no capital stock

and nothing except a name to save it from non-entity, and shares of stock whose only excuse for existence was to promote and foster the honesty of Louis Schlesinger. It is difficult to see what legal vestige remained of the Prager-Schlesinger Company after the bankruptcy in 1912. It is hard to conceive of a corporation without capital and without assets, and hard to believe that such a concern can, in modern times, exist even in contemplation of law.

The question is really a question of fact, not of law. The legal principle to be applied is acceptably stated in appellant's case, *In re Watertown Paper Company*, 169 Fed. 252, at page 256, which enumerates as follows the conditions under which courts will pierce the veil of corporate entity:

“(1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud. (2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation.”

That is undoubtedly the law, and we believe that the record brings this case within both of the above exceptions.

As we stated above, the Spokane Dry Goods Company, through the Spokane Merchants' Association, sued the Clere Clothing Company for a bal-

ance due upon goods delivered to the Prager-Schlesinger Company between August 1, 1912, and June, 1913, and recovered a judgment, which was affirmed in the Supreme Court April 5, 1915. Counsel for appellant will doubtless think himself imposed upon by our reference to an adjudication in another controversy which grows out of the same state of facts, but which is not a part of the record in this action. The opinion of the Washington court is certainly not binding as to the facts found; but it is surely a case in point for the consideration of the court along with the authorities cited in appellant's brief. We therefore quote from the opinion of the Supreme Court of Washington in the case of Spokane Merchants' Association, a corporation, v. Clere Clothing Company, a corporation (April 5, 1915), 42 Wash. Dec. (advance sheets) 353; 147 Pac. 414:

"The evidence makes it too plain for argument that the delivery to Gilmore & Co. and the original delivery to the Prager-Schlesinger Co. were not consignments in the ordinary commercial sense of a transmission to an independent merchant or factor for sale on commission. They were mere deliveries to the appellant's agents to sell at retail and deposit the proceeds to the appellant's credit. The appellant financed the business in both instances and retained absolute control of the goods. The possession of the goods was at all times that of the appellant by its sales agent.

The fact that the Prager-Schlesinger Co. was a corporation does not alter the case. The

re-organization of that company at the time of the original delivery to it of the goods was for the confessed purpose of giving the appellant an absolute control and oversight of its agent. This emphasizes the correctness of our conclusion. Clere at all times acted for and in behalf of the appellant. When he and appellant's attorney took over solely in consideration of the agency practically the entire capital stock of the Prager-Schlesinger Co., that company, by every just and reasonable intentment became a subsidiary corporation of the appellant. This status being once established, as it clearly was, if evidence short of an admission can establish anything, it was incumbent upon the appellant to show that the Prager-Schlesinger Co. was rehabilitated as an independent entity with complete control of its own functions and destiny at the time of the alleged sale of the goods to it on January 25, 1913. This the evidence wholly fails to establish. All of the capital stock of the corporation save one share was still in effect owned and in reality controlled by the appellant through its president and attorney, who still constituted two of the three trustees. The attorney was still retained as secretary. The appellant's bank account was still used *ad libitum* by the Prager-Schlesinger Co. True, the appellant's officers claim this was unauthorized and unknown to them, but it taxes credulity to assume it knew nothing of the state of its own bank account for months, especially since it had at the situs of the whole transaction its own attorney who was also trustee and secretary of the Prager-Schlesinger Co. confessedly so constituted for the appellant's protection. The very fact that no formal bill of sale was made and no chattel mortgage taken

to secure the payment of the alleged purchase price of the goods, further lends strong color to the view that the Prager-Schlesinger Co. was still what it had been from the date of its re-organization, a subsidiary company of the appellant. Many other circumstances in evidence point to the same conclusion."

With reference to this case we might say, adopting the language with which appellant refers to the Watertown Paper case, "the facts therein and the holding of the court seem to be particularly pertinent to the case at bar."

The Trustee believes that to allow appellant's claim would be to permit the bankrupt to prove a claim against itself, and that the opinion of the referee and the judgment of the District Court should therefore be affirmed.

Respectfully submitted,

WAKEFIELD & WITHERSPOON

Attorneys for Trustee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

ST. PAUL, MINNEAPOLIS and
MANITOBA RAILWAY COMPANY,
Corporation and GREAT NORTHERN
RAILWAY COMPANY, a Corporation,

Appellees.

Transcript of Record

Upon Appeal From the United States Court
for the District of Montana.

Filed

JAN 21 1915

F. D. Monckton,
Clerk.

No.....

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

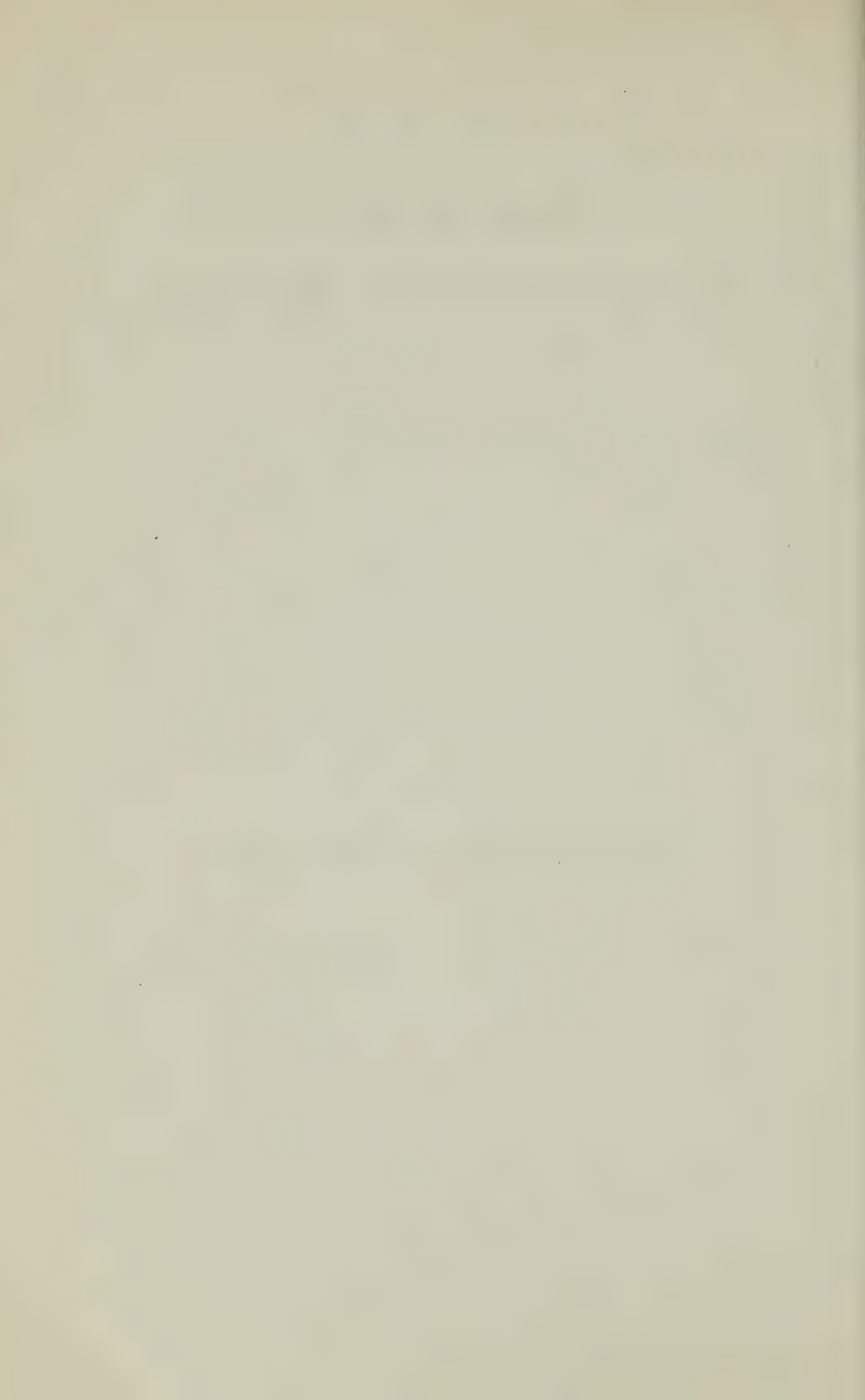
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Upon Appeal From the United States Court
for the District of Montana.



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IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MONTANA.

UNITED STATES OF AMERICA,

Complainant,

vs.

ST. PAUL, MINNEAPOLIS and
MANITOBA RAILWAY COMPANY,
a Corporation, and GREAT NORTHERN
RAILWAY COMPANY, a Corporation,

Defendants.

Amended Bill of Complaint.

TO THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA:

The United States of America, by the Attorney General, and Burton K. Wheeler, United States Attorney for the district of Montana, files this its amended bill of complaint (leave of court having first been obtained) against the St. Paul, Minneapolis and Manitoba Railway Company, a corporation, created under the laws of the State of Minnesota, and the Great Northern Railway Company, a corporation, created under the laws of the State of Minnesota, and thereupon complains and shows to your Honor:

First.

That the defendant, St. Paul, Minneapolis and Manitoba Railway Company is now, and at all the times herein mentioned, was a corporation organized and existing under and by virtue of the laws of the state of Minnesota, and at all the times herein mentioned was, and is, engaged in the business of a common carrier of freight and passengers in the state and district of Montana.

Second.

That the defendant, Great Northern Railway Company, is now, and at all the times herein mentioned, was a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and at all the times herein mentioned was and is engaged in the business of a common carrier of freight and passengers in the state and district of Montana.

Third.

That at all the dates and times herein mentioned, and prior to the 17th day of June, 1907, your orator was the owner in fee simple of those certain lands situated in the state and district of Montana, and within the Flathead land district, of which the land office is at Kalispell (formerly within the Missoula land district), situated in the county of Lincoln, and more particularly described as follows, to wit: Lots one (1), two (2), three (3), four (4), five (5), six (6) and seven (7), and the southeast quarter of the northwest quarter (S E $\frac{1}{4}$ of N W $\frac{1}{4}$) of section thirteen (13), township thirty-one (31) north, range thirty-three (33) west of the Montana principal meridian.

Fourth.

That on or about the 31st day of March, A. D. 1906, said defendant, St. Paul, Minneapolis and Manitoba Railway Company, filed in the United States land office at Kalispell, in said Flathead land district, in the said state and district of Montana, a certain list of lands, describing among others, the lands hereinbefore described; that attached to and a part of said list was an affidavit made and executed by one Thos. R. Benton, the duly authorized agent of the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, and which said affidavit was duly acknowledged before a notary public residing in the county of Ramsey, state of Minnesota, in which said affidavit it was alleged, claimed and asserted, among other things, that said list of lands and said lands were selected by the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, and that said lands were a portion of the public lands claimed by it as inuring to it under the Act of Congress entitled "An act for the relief of settlers upon certain lands in the states of North Dakota and South Dakota," which said Act of Congress was approved August 5, 1892; that said lands at the time of the filing of said list were then and there vacant and unappropriated and were not interdicted nor reserved lands, and were of the character contemplated by said Act. That at the time of the filing of said list and affidavit, said defendant, St. Paul, Minneapolis and Manitoba Railway Company, paid to the Register and Receiver of the said United States land office, at Kalispell aforesaid,

the sum of four dollars as an assessment of the fees payable to the said Register and Receiver, and then and there obtained from said Register and Receiver a certificate and receipt approving said list and certifying, among other things, that said list was found to be accurate by a search of the records, plats and files of said United States land office at Kalispell aforesaid, and also certifying that said lands were not classified and returned as mineral lands or land, and were not claimed as swamp lands, and that there was no homestead, preemption, state or other valid claim to any portion of said lands on file or of record in said United States land office. That in order to obtain patent to said lands hereinbefore described, under said Act of Congress hereinbefore referred to governing the acquisition of the title thereto, it became and was necessary for the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, to file said list and affidavit and secure from said Register and Receiver of said United States land office said certificate, approval and receipt hereinbefore mentioned, and it was also incumbent upon said defendant, St. Paul, Minneapolis and Manitoba Railway Company, to prove to the satisfaction of the Register and Receiver, and to the officers of complainant's General Land Office, whose duty it was to decide whether a patent thereon might lawfully be issued, by satisfactory testimony and evidence that the said lands were of the character contemplated by said Act of Congress hereinbefore referred to. That said above described lands, when so selected, were lands of the complain-

ant belonging to its public domain, were and are mineral lands of great value, to wit, of the value of ten thousand dollars and upwards, and were not subject to selection by said defendant, St. Paul, Minneapolis and Manitoba Railway Company, as inuring to it under the said Act of Congress, but were subject to entry only under the provisions of Chapter 6, Title XXXII of the Revised Statutes of the United States; all of which the said defendant St. Paul, Minneapolis and Manitoba Railway Company, by its officers, attorneys, agents and servants, at the time of the filing of said list and at all times subsequent, well knew.

That thereafter such proceedings were had that on the 24th day of June, A. D. 1907, a patent was issued by the United States to said defendant, St. Paul, Minneapolis and Manitoba Railway Company for the lands hereinabove described, and duly received by it.

Fifth.

That in September, A. D. 1895, said lands hereinbefore described, among others, were classified as mineral by the board of mineral land commissioners under the Act of February 26, 1895 (28 Stat. 683) entitled "An Act to provide for the examination and classification of certain mineral lands in the states of Montana and Idaho." That thereafter the Northern Pacific Railroad Company filed a verified protest with the Register and Receiver of the United States Land Office at Missoula, Montana, against the acceptance of said classification of said board of mineral land commissioners, and thereafter a hearing upon said protest was duly ordered and held and on the 17th

day of June, A. D. 1897, said Register and Receiver of the said land office at Missoula, Montana, adjudged said land to be non-mineral in character; and thereafter an appeal was duly taken from the decision of the said Register and Receiver, to the Commissioner of the General Land Office, and on the 16th day of November, A. D. 1897, the Commissioner of the General Land Office affirmed the decision of the said Register and Receiver of the United States Land Office at Missoula, and thereafter such proceedings were duly had that on April 30th, A. D., 1900, the Secretary of the Interior reversed said decision and held the said land to be mineral in character; that thereafter a motion to review said last mentioned decision was filed by the said Northern Pacific Railroad Company, and on August 1st, A. D. 1900, the said Secretary of the Interior adhered to his former decision of April 30th, A. D. 1900, and held said land to be mineral in character, and thereafter the said classification of said land as mineral by said board of mineral land commissioners hereinbefore mentioned was duly approved by the said Secretary of the Interior on June 15th, A. D. 1901. That through inadvertance and mistake the proper officials of your orator, whose duty it was so to do, did not notify the Register and Receiver of the said United States Land Office at Kalispell, Montana, of the decision of said Secretary of the Interior under date of August 7, A. D. 1900, holding the said land to be mineral in character, and of the approval of said classification by said board of mineral land commissioners, by said Secretary of

the Interior under date of June 15th, A. D. 1901, and did not transmit said decision and approval, or either of them, to said Register and Receiver until the 8th day of May, A. D. 1907.

Sixth.

That the said certificate and receipt hereinbefore referred to insofar as they relate to the lands hereinbefore described, were issued by the said Register and Receiver to said defendant, St. Paul, Minneapolis and Manitoba Railway Company, in reliance by them, and each of them, upon the truth of the said list and affidavit and the statements therein contained filed by said defendant, St. Paul, Minneapolis and Manitoba Railway Company, as aforesaid, and that said patent, insofar as it relates to the lands hereinbefore described, was issued by the officers of the said United States to said defendant, St. Paul, Minneapolis and Manitoba Railway Company, in reliance upon the truth of said list and affidavit hereinbefore described, and the statement therein contained, and said certificate and receipt of the said Register and Receiver, and through the inadvertance and mistake of the officers of your orator in overlooking the decision of the Secretary of the Interior, in letter "N," under date of August 6th, 1900, wherein the said Secretary of the Interior held said land to be mineral in character, and, in overlooking the approval of said classification of said land as mineral by said land commissioners by the Secretary of the Interior under date of June 15th, A. D. 1901.

Seventh.

That said list of lands and affidavit, and each of them, filed by said defendant, St. Paul, Minneapolis and Manitoba Railway Company, as aforesaid, insofar as they and each of them, relate to the lands described herein, were then and there false and fraudulent, as was then and there well known to said defendant, by its officers, agents and attorneys, and that the said list and affidavit and each of them, were then and there filed with intent to deceive the officers of the United States, and to fraudulently obtain and procure the issuance to said defendant of said certificate and receipt by the Register and Receiver of the United States Land Office at Kalispell, Montana, and with intent then and there to deceive the officers of the United States and to fraudulently obtain title to said lands by means of false and fraudulent statements and testimony made and contained in said list and affidavit, in this, to wit: That said lands were not a part and a portion of the public land inuring to said defendant, St. Paul, Minneapolis and Manitoba Railway Company, under the Act of Congress entitled "An act for the relief of settlers upon certain lands in the states of North Dakota and South Dakota," which said Act was approved on August 5, 1892; that said lands were interdicted mineral lands and were not of the character contemplated by said Act; and your orator alleges the fact to be that each and every of the said statements so made by the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, in said list and affidavit as hereinbefore specifically mentioned

and set forth and which are contained in said list and affidavit, to prove that said lands hereinbefore described were of the character contemplated by said Act of Congress, are utterly false and fraudulent and untrue, as the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, then and there well knew; and your orator alleges the fact to be that the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, at the time of filing of said list and affidavit as aforesaid, had full and complete notice and knowledge of the mineral character of said lands.

Eighth.

That said list and affidavit hereinbefore mentioned, and filed as aforesaid, by said defendant, St. Paul, Minneapolis and Manitoba Railway Company, was then and there false, fraudulent and untrue in the several particulars as hereinbefore set forth, and the same were made, filed and offered as proof that said lands were of the character contemplated by said Act of Congress approved August 5, 1892, and entitled "An Act for the relief of settlers upon certain lands in the states of North Dakota and South Dakota," and were then and there filed for the false and fraudulent purpose of imposing upon and deceiving the Register and Receiver of the said United States Land Office, at Kalispell, Montana, and to cause and induce said officers of your orator to believe that the statements contained in said list and affidavit were then and there true, and for the purpose of obtaining and procuring, by means of said fraud and deceit, the issuance of said certificate and receipt by the said Regis-

ter and Receiver as hereinbefore specifically set forth. And that said list and affidavit were then and there filed as aforesaid, insofar as it related to the lands herein described for the false and fraudulent purpose of imposing upon and deceiving the said Register and Receiver of the said United States Land Office at Kalispell, Montana, and to cause and induce the said officers of your orator to believe that the statements and testimony therein contained were true, and that the said lands were of the character contemplated by said Act, and for the purpose of obtaining and procuring, by means of fraud and deceit, the issuance to said defendant of a United States patent for said lands; that the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, by means of said false and fraudulent list and affidavit, insofar as said list and affidavit to the lands hereinbefore described, imposed upon and deceived the said officers and agents of the said United States and caused and induced said officers to believe that the statements and testimony therein contained were true; and your orator alleges that the said officers of the said United States, supposing and believing that the statements and testimony contained in said list and affidavit, insofar as they relate to the lands herein described, were true and relying upon the truth of said statements and testimony so falsely and fraudulently made and given by said defendant, St. Paul, Minneapolis and Manitoba Railway Company, and believing from said statements and testimony contained in said list and affidavit that the said lands were of the character contemplated by said

Act of Congress, were wholly deceived, imposed upon and misled into the issuance of said receipt and certificate to said defendant, St. Paul, Minneapolis and Manitoba Railway Company, and believing that the statements and testimony contained in said list and affidavit were true, and through inadvertance and mistake on the part of the officers of your orator in overlooking letter "H" of August 6, 1910, and the approval of the classification of said lands as mineral by the Secretary of the Interior on June 15, 1901, hereinbefore specifically mentioned, were wholly deceived, imposed upon and misled in permitting the issuance of said United States patent for said lands to said defendant, St. Paul, Minneapolis and Manitoba Railway Company.

Ninth.

That after the issuance of said patent and on or about the 20th day of February, A. D. 1910, this complainant demanded of said defendant, St. Paul, Minneapolis and Manitoba Railway Company, that it reconvey to the United States the lands hereinbefore described; that the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, then and there refused so to do, and still so refuses at the time of the commencement of this action.

Tenth.

That the defendant, Great Northern Railway Company, claims to have some interest in and to the lands hereinbefore described, but that said complainant is not fully and definitely informed as to the precise nature of said claim; and your orator alleges the fact

to be that if the said defendant, Great Northern Railway Company, has any interest in and to the said lands, the said interest was acquired by the said defendant, Great Northern Railway Company, with notice and knowledge of all the facts hereinbefore set forth at and prior to its acquiring any claim or interest in and to said lands, and that the said defendant, Great Northern Railway Company, never paid any consideration for the interest in and to said lands or any part thereof.

Eleventh.

That the existence of said patent, so fraudulently obtained and procured by the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, as aforesaid, on its face entitles the said defendant, St. Paul, Minneapolis and Manitoba Railway Company to exercise the right of absolute ownership of and over said lands and assert a legal title to the same to which the said defendant, St. Paul, Minneapolis and Manitoba Railway Company, is not entitled. That if said patent remains uncanceled and in force, the same can be used in fraud of your orator and all persons relying upon the same as a valid and substantial conveyance of the legal title to said lands and premises, all of which acts and doings are contrary to equity and good conscience, and done to the manifest injury of your orator.

For as much as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendants, St. Paul, Minneapolis and Manitoba Railway Company, and Great Northern Railway Company, may, if they can show why your orator

should not have the relief hereby prayed, and make a full disclosure and discovery of the matters aforesaid and according to the best and utmost of their knowledge, remembrance, information and belief, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived.

And your orator prays that a decree be rendered by this court, declaring null and void the said patent issued to said defendant, St. Paul, Minneapolis and Manitoba Railway Company, for said lands and premises, and requiring, directing and compelling said defendant, St. Paul, Minneapolis and Manitoba Railway Company, to surrender, deliver up, and return the said patent to your orator, and that the said defendants, St. Paul, Minneapolis and Manitoba Railway Company, and Great Northern Railway Company, and the officers, agents and employes of each and both of said defendants, be forever and perpetually restrained and enjoined from setting up, asserting, or claiming any rights, privileges, benefits or advantages under said patent, and your orator prays for all such other orders, decree and judgment in the premises as is just and equitable, and as the circumstances and nature of the case may require.

May it please your Honor to grant unto your orator a writ of subpoena of the United States of America, issued out of and under the seal of this court, directed to the said defendants, St. Paul, Minneapolis and Manitoba Railway Company and Great Northern Railway Company, commanding them on a day certain to

appear and answer unto this bill of complaint, and to abide by and perform such order and decree in the premises as the court shall deem proper and required by the principles of equity and good conscience.

J. C. McREYNOLDS,

Attorney General of the United States.

B. K. WHEELER,

United States Attorney, District of Montana.

(Duly verified).

(Endorsed: Filed Jan. 19, 1914,

GEO. W. SPROULE, Clerk).

Thereafter, on February 7, 1914, a motion to dismiss was duly filed herein, being in the words and figures following, to-wit:

(TITLE OF COURT AND CAUSE.)

Motion to Dismiss.

COME NOW the defendants in the above entitled cause, and each of them, and (pursuant to Rule 29 of the Rules of Practice for the Courts of Equity of the United States, for the purpose of asserting defenses in point of law arising on the face of the amended Bill of Complaint herein, by reason of insufficiency of facts to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea) jointly and severally, move the Court to dismiss this action, and that the complainant take nothing by this action as against the said defendants, or any of them, that the Bill of Complaint be dismissed with prejudice as to said defendants, and as to each of them, and that said defendants go hence without day.

THIS MOTION is based upon the records and files in this cause.

THIS MOTION is made upon the grounds following:

1. Insufficiency of facts in said amended Bill of Complaint to constitute a valid cause of action in equity.

2. It appears from said amended Bill of Complaint that the lands described in said amended Bill of Complaint, the patent to which the complainant seeks to annul, were and are lands that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the Government and its officers to withdraw the same from sale and entry; and, by said amended Bill of Complaint, it appears that said suit is brought, and recovery is sought, by the complainant for lands that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the Government and its officers to withdraw the same from sale and entry; and, by reason of the premises, the said suit, as appears from said amended Bill of Complaint, is brought in violation of the provisions of Chapter Thirty-nine (39) of the Acts of the Fifty-fourth Congress of the United States, approved March 2nd, 1896, entitled "An Act to Provide for the Extension of the Time Within Which Suits May Be Brought to Vacate and Annual Land Patents, and for Other Purposes" (29 Statutes at Large, beginning on page 42), and the same is brought without authority of law, and the complainant's alleged

cause of action is barred by the provisions of said statute. That by reason of the premises the said amended Bill of Complaint does not state facts sufficient to constitute a valid cause of action in equity.

VEAZEY & VEAZEY,

Attorneys for Defendants.

(Endorsed: Filed February 7, 1914.

GEO. W. SPROULE, Clerk.)

Thereafter, on March 31, 1914, the District Court aforesaid rendered its decision herein in the words and figures following, to-wit:

(TITLE OF COURT AND CAUSE.)

Decision.

The act March 3, 1891, Sec. 8, provides suits to vacate land patent thereafter issued, must be brought within five years. No matter what error or mistake the land department made, no matter how gross the fraud and misrepresentations of the patentee, after five years this "benign" statute made the voidable patent valid, provided the lands were public lands open to conveyance by the land department.

U. S. vs. Ry. Co., 165 U. S. 476.

U. S. vs. Chandler, 209 U. S. 450.

Act 1896, March 2, extended the aforesaid provisions to railway grant patents. The act last aforesaid accordingly applies to patents to railroads for grant lands secured by fraud and misrepresentation as well as to those erroneously issued, if by the latter term is intended mistakes of the land department alone. Its general meaning, however, and no reason appears why that should not be given it, embraces patents issued

through the patentee's fraud. The ^{last} act aforesaid further provides that "no suit shall be brought or maintained" to annul patents for lands issued to the beneficiaries of public grants in lieu of granted lands to them lost because of the government's failure to withdraw the latter from entry and sale.

The patent in suit is of the character last aforesaid. The language is clear and plain. "No suit shall be brought or maintained." Again no reason appears why the ordinary or general meaning thereof should not be given, viz, if the lands were public lands open to patent by the land department, once patented inquiry ~~is~~ is closed, suit to annul for any reason prohibited. Such must be the intent of Congress and doubtless for good reason. Said act first provides that in respect to land grant patents in general, whatever the fraud that induced them, after five years no suits should be maintained to annul them; and it second provides that in respect to land grant patents in particular—the special variety—at no time should suits be maintained to annul them, and likewise whatever the fraud that induced them. No exceptions expressed in statutes of limitation and for stronger reason in statutes of confirmation, (for that is the nature of the Act 1896), none will be implied and read in by construction,—not even in cases of fraud. Primarily for defendants' benefit, the legislature is presumed he shall have all thereof save where it inserted some exception.

The motion to dismiss is granted.

March 31, 1914.

GEORGE M. BOURQUIN,

District Judge.

(Endorsed, filed March 31, 1914,

GEO. W. SPROULE, Clerk,

By HARRY H. WALKER, Deputy.)

Thereafter, on March 31, 1914, the court made and entered an order herein dismissing said cause, in words and figures following to-wit:

(TITLE OF COURT AND CAUSE.)

Minute entry of March 31, 1914.

No. 1010. It is ordered that the motion to dismiss in this cause be granted.

Thereafter, on May 28, 1914, the Court made and entered herein its decree in the words and figures following to-wit:

(TITLE OF COURT AND CAUSE.)

Decree.

THIS CAUSE having been heretofore submitted to the Court for decision upon the amended Bill of Complaint herein, and upon the joint and several motion of the defendants herein, to dismiss this cause for want of equity, and for that it appeared upon the face of said amended Bill of Complaint that this action is an action by or on behalf of, or in the interest of, or to the use of the United States, and as such is forbidden by the provisions of the Act of the Fifty-fourth Congress of the United States, approved March 2, 1896, entitled "An Act to Provide for the Extension of the Time Within Which Suits May Be Brought to

Vacate and Annul Land Patents, and for Other Purposes," (29 Statutes at Large, page 42), and for that it appeared from the said amended Bill of Complaint that the lands described in said amended Bill of Complaint, the patent to which the plaintiff seeks to annul, were and are lands, and that said suit was brought, and that recovery was sought by the Complainant, for lands, that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the Government and its officers to withdraw the same from sale and entry.

Upon the hearing said cause was argued by counsel for the respective parties hereto, and thereafter said motion to dismiss was by the Court sustained, and a decree ordered entered accordingly.

IN CONSIDERATION WHEREOF, and all and singular the matters aforesaid being considered, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complainant take nothing by this action, and that the Amended Bill of Complaint herein be, and the same hereby is, dismissed with prejudice, and that the defendants herein, Great Northern Railway Company and St. Paul, Minneapolis and Manitoba Railway Company, go hence without day.

This decree is final and on the merits.

Done in open Court this 28th day of May, A. D. 1914, and ordered entered as above.

GEORGE M. BOURQUIN,

District Judge.

Endorsed, filed and entered May 28, 1914,

GEO. W. SPROULE, Clerk.

Thereafter, on the 25th day of November, 1914, filed its appeal herein together with the allowance thereof, which is in the words and figures following:

(TITLE OF COURT AND CAUSE.)

IN EQUITY NO. 1010.

Appeal and Allowance.

The above-named complainant, the United States of America, conceiving itself aggrieved by the decree entered herein on the 28th day of May, A. D. 1914, in the above-entitled proceeding, does hereby appeal from said decree to the Circuit Court of Appeals for the United States for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Circuit Court of Appeals of the United States, for the Ninth Circuit, sitting at San Francisco, California.

B. K. WHEELER,

Solicitor for Complainant and Appellant.

The foregoing petition is hereby granted and an appeal is hereby allowed.

Dated this 25th day of November, A. D. 1914.

GEORGE M. BOURQUIN,

Judge of said District Court.

(Endorsed, filed November 25, 1914,

GEO. W. SPROULE, Clerk,

By HARRY H. WALKER, Deputy.)

That on the 25th day of November, 1914, appellant filed herein with its appeal and allowance, its assignment of errors, which are in the words and figures following:

(TITLE OF COURT AND CAUSE.)

IN EQUITY NO. 1010.

Assignment of Errors.

Now on this 25th day of November, A. D. 1914, came complainant, United States of America, by its solicitor, Burton K. Wheeler, United States Attorney for the District of Montana, and says that the decree made and entered in the above entitled cause on the 28th day of May, A. D. 1914, is erroneous and unjust to said complainant, in the following particulars, to-wit:

First: That the court erred in finding that the allegations of the amended bill of complaint herein were insufficient to constitute a cause of action in equity.

Second: That the court erred in finding that, after five years, no matter what error or mistake the land department of the United States of America made, no matter how gross the fraud and misrepresentations of the patentee, St. Paul, Minneapolis and Manitoba Railway Company, were, the Act of Congress of the United States, approved March 3rd, 1891. Section 8, made the voidable patent mentioned in the bill of complaint herein valid, provided, the lands were public lands of the United States of America open to conveyance by the land department of the United States of America.

Third: That the court erred in finding that the Act

of Congress of the United States, approved March 2nd, 1896, extended the provisions of the Act of Congress of the United States, approved March 3rd, 1891, to patents to railroads for grant lands secured by fraud and misrepresentations as well as to those patents erroneously issued.

Fourth: That the court erred in finding that the Acts of Congress of the United States, approved, both respectively, March 3rd, 1891, and March 2nd, 1896, applied to and embraced patents to lands issued through the 'patentees' fraud.

Fifth: The court erred in finding that the land patent, sought to be annulled and cancelled by this action, was one issued to the beneficiaries of public grants of land in lieu of granted lands lost to such beneficiaries because of the failure of the United States of America to withdraw such granted lands from entry.

Sixth: The court erred in holding that, if the lands described in the bill of complaint herein, were public lands of the United States of America, open to patent by the Land Department, that under the provisions of the Acts of Congress of the United States, approved March 3rd, 1891, and March 2nd, 1896, each respectively, once patent inquiry is closed, suit to annul or cancel the patent is prohibited.

Seventh: That the court erred in finding that no matter what fraud induced the issuance of a patent to land in general by the United States of America, no suit could be maintained to cancel such patent after five years from the date of issuance of such patent.

Eighth: That the court erred in finding that no matter what fraud induced the issuance of patent for grant land by the United States of America, no suit could be maintained at any time to cancel or annul such patent.

Ninth: That the court erred in holding and finding that the cause of action alleged in complainant's bill of complaint herein is not maintainable and is forbidden by the provisions of the Act of the Fifty-fourth Congress of the United States, approved March 2nd, 1896, entitled, "An Act to provide for the Extension of the Time Within Which Suits May Be Brought to Vacate and Annul Land Patents, and for Other Purposes," (29 Statutes at Large, page 42).

Tenth: That the court erred in holding and finding that the lands described in the amended bill of complaint herein, the patent to which plaintiff sought to cancel and annul, were and are lands, and that said suit was brought and that recovery was sought by complainant, for lands, that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the United States of America and its officers to withdraw said the same from sale and entry.

Eleventh: The court erred in refusing to find and hold that the facts alleged in complainant's bill of complaint were sufficient to constitute a cause of action in equity and that such cause of action was not barred or forbidden by the provisions of the Act of Congress of the United States, approved March 2nd, 1896.

Twelfth: That the court erred in holding that the

bill of complaint herein states no cause for equitable relief.

Thirteenth: That the court erred in sustaining defendants' motion to dismiss complainant's bill of complaint herein with prejudice.

Fourteenth: That the court erred in holding that under the pleadings herein complainant was entitled to no relief in equity as prayed for in the bill of complaint.

Fifteenth: That the court erred in entering a decree herein dismissing complainant's bill of complaint.

WHEREFORE complainant prays that said decree be reversed and said district court be directed to enter a decree herein as is prayed for in its bill of complaint.

Dated November 25, 1914.

BURTON K. WHEELER,
United States Attorney,
Solicitor for Complainant.

(Endorsed, filed Nov. 25, 1914,

GEO. W. SPROULE, Clerk,

By HARRY H. WALKER, Deputy).

Thereafter, on November 25, 1914, a citation on appeal herein was duly issued out of the above entitled court, which is in the words and figures following:

(TITLE OF COURT AND CAUSE.)

Citation on Appeal.

UNITED STATES OF AMERICA—ss.

To St. Paul, Minneapolis and Manitoba Railway Company, a corporation, and Great Northern Railway Company, a corporation, defendants and respondents, and Messrs. Veazey and Veazey, their at-

torneys and solicitors:

GREETING:

You, and each of you, are hereby notified that in the above entitled cause, a proceeding in equity, in the District Court of the United States, in and for the District of Montana wherein the United States of America is complainant and St. Paul, Minneapolis and Manitoba Railway Company and Great Northern Railway Company, corporations, are defendants, an appeal has been allowed the said Complainant, United States of America, therein to the United States Circuit Court of Appeals for the Ninth Circuit, and you, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at the City of San Francisco, in the state of California, within thirty days from the date hereof, to show cause, if any there be, why the decree mentioned in said appeal, and from which said appeal is taken, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, in and for the District of Montana, this the 25th day of November, A. D. 1914.

GEO. M. BOURQUIN,

Judge of the District Court of the United States, in and for the District of Montana.

Service of the foregoing citation and receipt of a copy thereof this 25th day of November, A. D. 1914,

is hereby admitted and acknowledged.

VEAZEY & VEAZEY,

Solicitors for Defendants and Respondents.

(Endorsed, filed Dec. 1, 1914,

GEO. W. SPROULE, Clerk.)

Thereafter, on December 2, 1914, the above entitled court duly made its order herein, which is in words and figures following:

(TITLE OF COURT AND CAUSE.)

Order Extending Time to Prepare, Etc., Record on Appeal.

Upon good cause shown, it is hereby ordered that complainant and appellant in the above entitled cause, may have thirty days in addition to the time allowed by law and the rules of the court within which to have prepared and certified up to the United States Circuit Court of Appeals for the Ninth Circuit the record on appeal herein.

Dated December 2nd, 1914.

GEO. M. BOURQUIN,

Judge.

Thereafter, on December 2, 1914, appellant duly served and filed herein its praecipe for a transcript of the record on appeal herein, which is in words and figures following, towit:

(TITLE OF COURT AND CAUSE.)

Praecipe for Transcript of Record.

To St. Paul, Minneapolis and Manitoba Railway Company, and Great Northern Railway Company, defendants and respondents, and Messrs. Veazey & Veazey, their solicitors:

The undersigned, solicitor for complainant and appellant herein, hereby files and serves upon you its praecipe, in conformity with the rules of court, indicating the portions of the record in the above entitled cause, to be incorporated into the transcript on appeal herein, and which said portions of said record you are hereby notified the said complainant and appellant will incorporate and include in the record on appeal herein:

Said portions are as follows:

1. The amended bill of complaint,
2. Defendants' motion to dismiss the amended bill of complaint;
3. The above entitled court's decision dated March 31, 1914, granting defendants' motion to dismiss the amended bill of complaint herein;
4. Minute entry order dated March 31, 1914, ordering the above entitled cause to be dismissed;
5. Decree made and entered in the above entitled cause on the 28th day of May, 1914, dismissing said cause and said amended bill of complaint;
6. Copy of appeal and allowance thereof by the court;
7. Assignment of errors;
8. Citation on appeal and admission of service by defendants;
9. Order extending time for completing and transmitting the record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit;
10. Copy of this praecipe.

The entire judgment roll as the same appears of record in the office of the clerk of the above entitled

court is not included herein, as only those portions of it which are specified in paragraphs numbered 1, 2, 4 and 5 of this praecipe are considered necessary for the purpose of the appeal herein.

BURTON K. WHEELER,

United States Attorney, District of Montana.

Solicitor for Complainant and Appellant.

Service of the foregoing praecipe and receipt of a copy thereof this 2nd day of December, 1914, is hereby admitted and acknowledged.

VEAZEY & VEAZEY,

Solicitors for Defendants and Respondents.

(Endorsed, filed Dec. 10, 1914,

GEO. W. SPROULE, Clerk,

By HARRY H. WALKER, Deputy.)

Clerk's Certificate to Transcript of Record.

United States of America, }
District of Montana. } ss.

I, George W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 27.7. pages, numbered from 1 to 27., inclusive, is a true and correct transcript of the amended bill of complaint, motion to dismiss, decision of the court, minute order dismissing bill of complaint, decree, appeal and allowance, assignment of errors, citation on appeal and acknowledgment of service thereof, order of court extending time for completing and transmitting record on appeal herein, and copy of praecipe for transcript of

record and acknowledgement of service thereof, and the whole thereof as appears from the original records and files of said court in my possession as such clerk; and I do further certify that I transmit herewith the original citation issued in said case.

I do further certify that the costs of the transcript of record amount to the sum of \$^{6²⁵}....., and have made a charge against appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this ^{15th} day of January, A. D. 1915.

..... *Georg Sproule*

Clerk.

(SEAL)

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,
vs.
ST. PAUL, MINNEAPOLIS and
MANITOBA RAILWAY COMPANY,
a Corporation, and GREAT NORTH-
ERN RAILWAY COMPANY, a Cor-
poration,
Appellees.

BRIEF OF APPELLANT.

BURTON K. WHEELER,
United States Attorney,

HOMER G. MURPHY,
Assistant U. S. Attorney,

FRANK WOODY,
Assistant U. S. Attorney.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,

vs.

ST. PAUL, MINNEAPOLIS and
MANITOBA RAILWAY COMPANY,
a Corporation, and GREAT NORTH-
ERN RAILWAY COMPANY, a Cor-
poration,

Appellees.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

This is an appeal from the decree entered by the District Court of the United States for the District of Montana on the 28th day of May, 1914, in favor of appellees and against the appellant and dismissing appellant's amended bill of complaint.

The action in which said decree was entered was brought by appellant for the purpose of having

cancelled and set aside on the grounds of fraud on the part of the patentee and inadvertence on the part of the officers of the land department a patent for lands theretofore issued to the St. Paul, Minneapolis and Manitoba Railway Company, one of the appellees, the amended bill of complaint having been filed on Jan. 19, 1914.

The amended bill of complaint (Tr. pp. 1-14), alleges in substance the following: That the appellees are corporations, (Tr. p. 2); that prior to June 17th, 1907, the plaintiff was the owner in fee of the lands described in the amended bill of complaint (Tr. p. 2); that in September, 1895, said lands were classified as mineral by the board of mineral land commissioners under the Act of February 26, 1895, (28 Stat. 683), (Tr. p. 5); that the Northern Pacific Railroad Company filed a protest against said classification with the Register and Receiver of the United States Land Office at Missoula, Montana, and on a hearing of such protest said Register and Receiver adjudged said land to be non-mineral (Tr. pp. 5-6); that upon appeal to the Commissioner of the General Land Office the decision of the Register and Receiver was affirmed (Tr. p. 6); that on appeal to the Secretary of the Interior such decision was on April 30th, 1900, reversed and said lands were held to be mineral, and that upon a motion to review the Secretary of the Interior adhered to his former decision, and on June 15th, 1901, the Secretary of the Interior approved the classification of said lands made by

said board of mineral land commissioners (Tr. p. 6); that through inadvertence and mistake the Register and Receiver of the United States Land Office at Kalispell, Montana, were not notified of the decision of the Secretary of the Interior holding said lands to be mineral or of the approval of such classification of the board of mineral land commissioners by the Secretary of the Interior until May 8th, 1907 (Tr. pp. 6-7); that on March 31st, 1906, the appellee St. Paul, Minneapolis & Manitoba Railway Company filed in the land office at Kalispell a certain list of lands, describing the lands described in the amended bill of complaint and that attached to said list was an affidavit of the duly authorized agent of said appellee St. Paul, Minneapolis & Manitoba Railway Company, in which it was alleged, claimed and asserted that said lands were selected by said St. Paul, Minneapolis & Manitoba Railway Company and that said lands were a portion of the public lands claimed by it as innuring to it under the Act of August 5, 1892, and that said lands were vacant and unappropriated and were not interdicted nor reserved lands and were of the character contemplated by said Act, (Tr. p. 3); that upon payment of the required fees a receipt and certificate approving said list was obtained from the Register and Receiver of said land office, in which certificate it was certified that said list was found to be accurate by a search of the records, plats and files of said land office and that said lands were not classified and returned as mineral

lands, (Tr. pp. 3-4); that in order to obtain patent to said lands under said Act of Aug. 5, 1892, it was necessary for said St. Paul, Minneapolis & Manitoba Railway Company to file said list and affidavit and secure said receipt and certificate of approval, and it was also incumbent upon it to prove to the satisfaction of said Register and Receiver, and to the officers of the General Land Office, by satisfactory testimony and evidence that said lands were of the character contemplated by said Act (Tr. p. 4); that said lands when so selected were lands belonging to appellant's public domain, and were and are mineral lands of great value, and were not subject to selection by said St. Paul, Minneapolis & Manitoba Railway Company as innuring to it under said Act, all of which said St. Paul, Minneapolis & Manitoba Railway Company, by its officers, attorneys and agents, at the time of the filing of said list and at all times subsequent thereto well knew (Tr. pp. 4-5); that thereafter such proceedings were had that on June 24, 1907, a patent was issued to and received by said St. Paul, Minneapolis & Manitoba Railway Company (Tr. p. 5); that said receipt and certificate were issued by said Register and Receiver in reliance by them upon the truth of said list and affidavit and the statements therein contained, and that said patent was issued by the officers of appellant in reliance by them upon the truth of said list and affidavit and the statements therein contained and said certificate and receipt of the said Register and Receiver, and through inad-

vertence and mistake in overlooking the decision of the Secretary of the Interior holding said lands to be mineral and the approval of the classification thereof by the Secretary of the Interior (Tr. p. 7); that said list and affidavit was false and fraudulent as was then and there known to said St. Paul, Minneapolis & Manitoba Railway Company, by its officers, agents and attorneys, and that said list and affidavit was filed with intent to deceive the officers of the appellant and to fraudulently obtain and procure the issuance of said certificate and receipt and to fraudulently obtain title to said lands by means of the false and fraudulent statements and testimony contained in said list and affidavit, in this, that said lands were not a part of the public lands innuring to said St. Paul, Minneapolis & Manitoba Railway Company under the Act of August 5, 1892, and that said lands were interdicted mineral lands and were not of the character contemplated by said Act, and that each of the statements set forth and contained in said list and affidavit to prove the lands were of the character contemplated by said Act were utterly false and fraudulent and untrue, as was then and there well known to the said St. Paul, Minneapolis & Manitoba Railway Company at the time of the filing of said list and affidavit, and that at such time said St. Paul, Minneapolis & Manitoba Railway Company had full and complete notice and knowledge of the mineral character of said lands (Tr. pp. 8-9); that the officers and agents of the appellants believing that

the statements contained in said list and affidavit were true, and that said lands were of the character contemplated by said Act were wholly deceived and imposed upon and misled into the issuance of said receipt and certificate and believing the statements contained in said list and affidavit to be true and through inadvertence and mistake in overlooking the decision of the Secretary of the Interior holding said lands to be mineral and the approval of such classification by the Secretary of the Interior the officers of the appellant were wholly deceived, imposed upon and misled into permitting the issuance of said patent (Tr. pp. 9-11); that after issuance of said patent the appellant demanded a reconveyance to it of said lands (Tr. p. 11); that the appellee Great Northern Railway Company claims some interest in said lands, the precise nature of said claim being unknown to appellant, but that if the said Great Northern Railway Company has any interest in said lands the same was acquired with notice and knowledge by said Great Northern Railway Company, prior to the acquiring of such interest, of all of the facts set forth in the amended bill of complaint, and that said Great Northern Railway Company never paid any consideration for any such interest, (Tr. pp. 11-12).

To the amended bill of complaint the appellees filed a motion to dismiss (Tr. pp. 14-16), and on March 31st, 1914, the Court filed its decision sustaining said motion to dismiss, (Tr. pp. 16-18), and thereafter and on May 28th, 1914, a decree was duly

made and entered dismissing the appellant's amended bill of complaint, (Tr. pp. 18-20).

ASSIGNMENT OF ERRORS.

With the petition for appeal the following assignment of errors were filed. (Tr. pp. 21-24),

First: That the court erred in finding that the allegations of the amended bill of complaint herein were insufficient to constitute a cause of action in equity.

Second: That the court erred in finding that, after five years, no matter what error or mistake the land department of the United States of America made, no matter how gross the fraud and misrepresentations of the patentee, St. Paul, Minneapolis and Manitoba Railway Company, were, the Act of Congress of the United States, approved March 3rd, 1891, Section 8, made the voidable patent mentioned in the bill of complaint herein valid, provided, the lands were public lands of the United States of America open to conveyance by the land department of the United States of America.

Third: That the court erred in finding that the Act of Congress of the United States, approved March 2nd, 1896, extended the provisions of the Act of Congress of the United States, approved March 3rd, 1891, to patents to railroads for grant lands secured by fraud and misrepresentations as well as to those patents erroneously issued.

Fourth: That the court erred in finding that the Acts of Congress of the United States, approved, both respectively, March 3rd, 1891, and March 2nd, 1896, applied to and embraced patents to lands issued through the patentee's fraud.

Fifth: The court erred in finding that the land patent, sought to be annulled and cancelled by this action, was one issued to the beneficiaries of public grants of land in lieu of granted lands lost to such beneficiaries because of the failure of the United States of America to withdraw such granted lands from entry.

Sixth: The court erred in holding that, if the lands, described in the bill of complaint herein, were public lands of the United States of America, open to patent by the Land Department, that under the provisions of the Acts of Congress of the United States, approved March 3rd, 1891, and March 2nd, 1896, each respectively, once patent inquiry is closed, suit to annul or cancel the patent is prohibited.

Seventh: That the court erred in finding that no matter what fraud induced the issuance of a patent to land in general by the United States of America, no suit could be maintained to cancel such patent after five years from the date of issuance of such patent.

Eighth: That the court erred in finding that no matter what fraud induced the issuance of patent for grant land by the United States of America, no suit could be maintained at any time to cancel or

annul such patent.

Ninth: That the court erred in holding and finding that the cause of action alleged in complainants bill of complaint herein is not maintainable and is forbidden by the provisions of the Act of the 54th Congress of the United States, approved March 2nd, 1896, entitled, "An Act to Provide for the Extension of the Time Within Which Suits May be Brought to Vacate and Annul Land Patents, and for Other Purposes" (29 Statutes at Large, page 42).

Tenth: That the court erred in holding and finding that the lands described in the amended bill of complaint herein, the patent to which plaintiff sought to cancel and annul, were and are lands, and that said suit was brought and that recovery was sought by complainant, for lands, that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the United States of America and its officers to withdraw the same from sale and entry.

Eleventh: The Court erred in refusing to find and hold that the facts alleged in complainant's bill of complaint were sufficient to constitute a cause of action in equity and that such cause of action was not barred or forbidden by the provisions of the Act of Congress of the United States, approved March 2nd, 1896.

Twelfth: That the court erred in holding that the bill of complaint herein states no cause for

equitable relief.

Thirteenth: That the court erred in sustaining defendants' motion to dismiss complainant's bill of complaint herein with prejudice.

Fourteenth: That the court erred in holding that under the pleadings herein complainant was entitled to no relief in equity as prayed for in the bill of complaint.

Fifteenth: That the court erred in entering a decree herein dismissing complainant's bill of complaint.

ARGUMENT.

The motion to dismiss (Tr. pp. 14-16), was made upon two grounds, one general in its nature and the other special. The first, or general, was insufficiency of facts to constitute a cause of action in equity, and the second, or special, was that it appears from the amended bill of complaint that the lands, the patent to which it was sought to annul, were lands patented in lieu of other lands covered by a grant which were relinquished by the grantee in consequence of the failure of the Government and its officers to withdraw the same from sale and entry, and that it therefore appears from said amended bill of complaint that said suit was brought in violation of the provisions of Chapter 39 of the Acts of the Fifty-fourth Congress, approved Mar. 2, 1896, (29 Stats. at L. 42), and that said suit was

brought without authority and it was barred by the provisions of said statute.

In sustaining the motion to dismiss, the court, in its decision construed the following statutes:

Section 8 of the Act of Mar. 3, 1891, (26 Stats. at L. 1098), (6 Fed Stats. Ann. 526), which is as follows:

“That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.”

Section 1 of the Act of Mar. 2, 1896, (29 Stats. at L. 42), (6 Fed. Stats. Ann. 449), which is as follows:

“That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title

of such purchaser is hereby confirmed. Provided, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.”

Section 2 of the Act of Aug. 5, 1892, (27 Stats. at L. 390), (6 Fed. Stats. Ann. 447), which reads as follows:

“That the said railway company is hereby permitted to select in lieu of any lands forming odd-numbered sections or parts thereof situated in the State of North Dakota or in the State of South Dakota, within the ten mile limits of a grant of lands made to the Territory of Minnesota * * * opposite to and coterminous with such portion of said railroad as was constructed and completed within the time required by said grant and the acts amendatory thereof for the construction and completion of the whole of said railroad, which, prior to January first, Anno Domini eighteen hundred and ninety one, any person had purchased or occupied or improved, in good faith, under color of title or right to do so, derived from any law of the United States relating to the public domain, but not including any lands within the limits of the grant to aid in the construction of the Saint Vincent branch of said road, as located under the Act of March third, eighteen hundred and seventy one, upon which

any person or persons had, in good faith, settled or made or acquired valuable improvements thereon prior to March, eighteen hundred and seventy eight, an equal quantity of non-mineral public lands, so classified as non mineral at the time of actual government survey which has been made or shall be made, of the United States, not reserved and to which no adverse right or claim shall have been attached at the time of the making of such selection lying within any state into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and and released * * *."

Assignments of Error Nos. 1, 6, 9, 11 and 12 are intended to attack the decree entered on that portion of the decision sustaining the motion to dismiss on the ground that the bill of complaint does not state facts sufficient to constitute a cause of action in equity; Nos. 5 and 10 to attack the decree entered on that portion of the decision sustaining the motion to dismiss and holding that the action was brought to cancel a patent to lands which had been selected and patented in lieu of lands originally granted and lost or relinquished by reason of the failure of the Government to withdraw such lands from entry and sale; Nos. 2, 3, 4, 7 and 8 to attack the decree entered on that portion of the decision sustaining the motion to dismiss on the ground that said action was barred by the provisions of Section 1 of the Act of Mar. 2, 1896, while Nos. 13, 14 and 15 are intended to attack the whole decree entered

on the decision dismissing the bill of complaint and ordering the entry of the decree.

Instead of taking up and considering each assignment of error separately we will take them up and consider them in the groups as we have hereinbefore referred to them.

ASSIGNMENTS OF ERROR NOS. 1, 6, 9, 11 and 12.

All of these assignments of error are to the effect that the court erred in holding that the amended bill of complaint did not state facts sufficient to constitute a cause of action in equity.

The action having been commenced within six years after the date of issuance of the patent, and the amended bill of complaint alleging both fraud on the part of the patentee, and inadvertence and mistake on the part of the officers of the Government, unquestionably if the last proviso of Section 1 of the Act of Mar. 2, 1896, does not apply to suits instituted to cancel patents issued after the passage of that act then the complaint does state facts sufficient to constitute a cause of action in equity.

We contend that the last proviso of Section 1 of the Act of Mar. 2, 1896, does not apply to suits instituted or brought to cancel patents to lands which were issued after the passage of the Act.

By reference to Section 8 of the Act of Mar. 3, 1891, it is found that it contains two provisions; the first relates to suits to cancel patents issued before the passage of the act which must be instituted

within five years after its passage, while the second relates to suits instituted to cancel patents issued after the passage of the act which must be instituted within six years after the date of issuance of patent.

By reference to Section 1 of the Act of Mar. 2, 1896, it is found that it contains four provisions; the first relates to suits instituted to cancel patents issued before the passage of the act which must be instituted within five years after its passage; the second relates to suits instituted to cancel patents issued after the passage of the act which must be instituted within six years after its passage; the third relates to suits to cancel patents when the lands have passed to bona fide purchasers; and the fourth relates to suits to cancel patents to lands that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw from entry and sale the lands originally granted and lost or relinquished.

It will be seen that in Section 8 of the Act of Mar. 3, 1891, and in the first two provisions of Section 1 of the Act of Mar. 2, 1896, Congress was very careful to refer specifically to suits instituted to cancel patents issued both before and after the passage of the acts so that there could be no question as to what particular suits those provisions applied, but that in the fourth provision of Section 1 of the Act of Mar. 2, 1896, no reference whatever is made to the institution of suits to cancel patents is-

sued after the passage of the act, the words used being “that were certified or patented in lieu of other lands.” If it was the intention of Congress that this last provision of Section 1 of the Act of Mar. 2, 1896, was to apply to suits to cancel patents issued after the passage of the act as well as before the passage of the act, why, instead of the words “that were” being used, were not the words “that were or may be hereafter” used, or why did not Congress, in this last proviso state in specific words, or terms, as it did in the first two provisions, that it was to apply not only to actions to cancel patents issued before the passage of the act but also to actions to cancel patents issued after the passage of the act?

In order to determine the intention of Congress with reference to the proviso of Section 1 of the Act of Mar. 2, 1896, with which we are here concerned we may examine not only the whole of said section and the whole of said act but also Section 8 of the Act of Mar. 3, 1891, and we may also consider the history of the legislation and the circumstances under which the law was enacted. In other words the proviso is to be read and considered in connection with the other provisions of the act of which it is a part, with previous acts covering the same subject and in the light of matters of public history relating to railroad grants made by the United States.

During a period covering many years prior to the passage of the Act of Mar. 2, 1896, Congress had made many extensive grants of public lands to aid in the construction of railroads and wagon roads, nearly, of not all of these granted lands lying in the Western and Pacific Coast states. The acts making these grants usually provided that the grant was to attach to certain lands lying within certain limits on each side of the railroad or wagon road to be constructed, as the same were finally located and constructed. At the time of the passage of these granting acts and at the time the roads were finally located and constructed and during a period of many years after their construction, practically none of these lands were surveyed, and the Government was unable, until such lands were actually surveyed, to definitely determine what particular lands passed by these grants, and the roads having been constructed before the lands were surveyed it frequently happened that, through lack of information in the general land office regarding the definite line of location and construction of the roads, lands to which it was afterwards found the grant attached were not withdrawn from entry and sale, but had been settled upon and valuable improvements had been made thereon in good faith. In order to protect these settlers we find Congress, from time to time, enacting legislation for the relief of settlers and also for the relief of the grantees, this legislation usually requiring the grantees to relinquish these lands and permitting them to select in lieu

thereof the same quantity of agricultural land within certain limits.

By the Act of Mar. 3, 1887, (24 Stats. at L. 256), (6 Fed. Stats. Ann. 433), the Interior Department was directed to adjust all of the various railroad and other land grants as speedily as practicable, and whenever it was found that lands had been erroneously patented, the law provided that action should be brought to cancel such patents.

By Section 8 of the Act of Mar. 3, 1891, it was provided that suits by the United States to vacate and annul any patent theretofore issued should only be brought within five years from the passage of the acts and suits to vacate and annul patents thereafter issued should only be brought within six years after the date of the issuance of such patents.

It seems that by 1896 the Interior Department had not completed the adjustment of all of the railroads grants and consequently the limitations contained in the Act of Mar. 3, 1891, were about to expire when the President, on January 17, 1896, addressed a message to Congress recommending that the Act of 1891 be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants.

Report No. 253 House of Representatives,
54th Congress, 1st Sess.

In accordance with the President's message a bill was reported by the Committee on Public Lands

of the House, the first section of which was as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a special grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. But no patents to any lands held by a bona fide purchaser shall be annulled or vacated, but the right and title of such purchaser is hereby confirmed.”

When this bill was under consideration in the House it was represented by Mr. Hepburn, of Iowa, that there were certain cases where the purchasers from railroad companies were entitled to protection and he cited a case where the Interior Department held that lieu lands might be given because through an oversight on the part of the officers of the United States the lands lying on the line of road within the limits of the grant were not withdrawn from entry and sale for a considerable period during which time settlers settled upon and made valuable improvements on such lands. In that case, when the road was constructed, it was found that, excluding these lands, there was not sufficient lands within the limits of the grant to meet the purposes of the grant and, as stated, the Interior Department held that lieu lands might be given in another locality.

It was represented that the railroad company was compelled to go far beyond the limits of its grant and select lands which were not benefitted by the construction of the railroad, and that over 200,000 were so selected. It was also represented that the law officers of the Interior Department subsequently changed their views and that the railroad company had no right to take these lands beyond the limits of their grants in lieu of the land within the limits of their grant lost to them by such entry and sale to settlers.

Upon hearing this objection and these representations Mr. Lacey, the Chairman of the House Committee on Public Lands, who had reported the bill and who was in charge of it, submitted the amendment which constitutes the proviso under consideration.

Congressional Record, 54th Congress, 1st Session.

Thus it appears that the lands taken by the company in the case cited and to which the proviso in question was intended to apply, were lands to which the company had no right under the grant, or by virtue of any law to select, but which had been selected by it and passed to patent, and that the Interior Department had changed its former holding and intended to recover the lands if possible.

We therefore submit that from the language used in Section 1 of the Act of Mar. 2, 1896, and from the conditions which existed at the time of the

passage of the act, which conditions were known to and fully considered by Congress at that time, and from the circumstances surrounding its passage, it is clearly and plainly evident that it was the intention of Congress that the last proviso of section 1 of said act was only to apply to patents theretofore issued for lands certified or patented in lieu of other lands originally granted and which were lost or relinquished by the failure of the Government of its officers to withdraw such lands from entry and sale, and that Congress did not intend such proviso to apply to patents for such lands issued after the passage of such act, and that the court therefore erred in holding that such proviso applied to patents issued for such lands after the passage of the act and in holding that therefore the amended bill of complaint failed to state facts sufficient to constitute a cause of action in equity.

ASSIGNMENTS OF ERRORS NOS. 5 AND 10.

The court, in its decision sustaining the motion to dismiss, found that, "It appears from said amended Bill of Complaint that the lands described in said amended Bill of Complaint, the patent to which the complainant seeks to annul, were and are lands that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the Government and its officers to withdraw the same from entry and sale;" (Tr. p. 15). In so finding we believe that the court committed error.

By an examination of the amended bill of Complaint (Tr. pp. 1-14), we find that it is alleged that on March 31st, 1906, the appellee, St. Paul, Minn. & Manitoba Ry. Co., filed a certain list of lands and that attached to said list was an affidavit in which it was alleged, claimed and asserted that said lands were selected by it and innured to it under the Act of August 5, 1892, and that said lands were vacant and unappropriated and were not interdicted nor reserved and were of the character contemplated by said act (Tr. p. 3), and that it was the duty of the appellee filing such list to prove to the satisfaction of the officers of the Government that said lands were of the character contemplated by the act, (Tr. p. 4). We also find that it is alleged in the amended bill of complaint that said lands when so selected were not subject to selection by said appellee as innuring to it under said act (Tr. p. 5), and that said lands were not a part or portion of the public land innuring to it under said act and that the same were not of the character contemplated by the act (Tr. p. 8). The substance of these allegations is that the appellee claimed the lands as innuring to it under the Act of August 5, 1892, but that these claims of the appellee were false, fraudulent and untrue, Nowhere in the amended bill of complaint is there any admission of any kind to the effect that the patent which the suit seeks to annul was issued for lands in lieu of other lands lost or relinquished by reason of the failure of the Government to withdraw the same from entry and sale.

ASSIGNMENTS OF ERROR NOS. 2, 3, 4, 7
AND 8.

All of these assignments of error relate and refer to the holding of the court, in sustaining the motion to dismiss, that under the last proviso of Section 1 of the Act of Mar. 2, 1896, a suit to cancel or annul a patent issued to a railroad company for lands selected in lieu of lands granted and lost or relinquished by reason of the failure of the Government or its officers to withdraw such lands from entry and sale cannot be maintained even tho' the patentee secured the issuance of such patent by means of fraud, and that such an action is barred thereby.

Even tho' it may be held that the last proviso of Section 1 of the Act of Mar. 2, 1896, applies to patents issued after the passage of the act as well as to patents issued before the passage of the act, we do not believe that it was the intention of Congress to say that once patent inquiry be closed the patent cannot thereafter be attacked no matter how gross the fraud and misrepresentations of the patentee.

There is nothing whatever in the act to indicate that Congress had in view a selection authorized by an act of Congress, and which, if otherwise regular, needed no statute of limitations for its protection. The selections under consideration, if made under any authority, were made under the authority contained in the Act of August 5, 1892, *supra*.

It has been shown hereinbefore, what lands

were intended to be protected by this proviso, namely, lands which railroad companies had been authorized by the Interior Department to select because the officers of the Department had erroneously allowed settlers to acquire title to lands which properly belonged to the companies. The case at bar is entirely different. The Government did not bring this action to cancel the patent because the company was misled by the action of the land department but, on the contrary, for the reason that the company deceived the land department and by fraud and deceit procured under an agricultural land grant lands which were known to be mineral, and which under the grant and the act permitting lieu land selections, were expressly exempted from the grant and from lieu selection. The allegations of the amended bill of complaint, in express terms, alleges fraud and deceit on the part of the patentee (Tr. pp. 5, 8, 9, 10, 11).

Congress has unequivocally declared that mineral lands may be acquired only under the mineral land laws and are not to be included in any other grant. Not only has Congress excepted mineral lands from all railroad grants, but during the year following the passage of the Act of July 5, 1864, granting lands to the Northern Pacific Railroad Company, Congress, by a joint resolution declared:

“That no act passed at the first session of the 28th Congress granting lands to states or corporations to aid in the construction of roads or other purposes, or to extend the time of

grants heretofore made shall be so construed as to embrace mineral lands which in all cases shall be and are reserved expressly to the United States unless otherwise specially provided in the act or acts making the grant."

13 Stats. at L. 567.

See also *Barden vs. N. P. Ry. Co.*, 154 U. S. 288.

It will also be observed that by the Act of Aug. 5, 1892, it is expressly provided that lands selected under the provisions of said act should be:

"Non-mineral public lands, so classified as non-mineral at the time of actual government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection."

That Congress by the proviso of Section 1 of the Act of Mar. 2, 1896, with which we are here concerned, did not intend to protect a fraudulent selection of mineral lands, after the same had been passed to patent, seems to us too clear for controversy. It is true the statutes of limitation are remedial and for that reason are entitled to favorable consideration, but it must also be remembered that a statute of limitation against the sovereign is an innovation wholly inconsistent with the theory of government, and unless it clearly appears that a

case falls within the statute no presumption can be indulged to include it.

It appears from the allegations of the complaint, which must be taken as confessed by the motion to dismiss, that the lands, to which the patent involved in the suit was issued, were mineral lands, that they had, long prior to the filing of the lieu land selection list, been determined by the land department to be mineral lands, and that these facts were known to the patentee at the time such lieu land list was filed and at the time such patent was issued to the patentee.

Under the Act of August 5, 1892, these lands could not have been lawfully patented to the patentee, and at the time of their selection and at the time of the issuance of patent there was on the statute books no law which would permit mineral lands to be lawfully patented to the patentee, under any conditions whatever.

There can be no doubt that the proviso in question, if taken literally and strictly, would forever bar any action to set aside or cancel a patent for such lieu lands no matter how entirely unlawful, *ultra vires*, may have been its issue, or how fraudulently obtained. But we do not believe such was the intention of Congress. We do not believe that Congress ever intended to throw its shield of protection over any such patent issued by the officers of the Government, without authority of law or when procured by the fraud and deceit of the patentee. Suppose, for instance, by mistake, or from

any other cause or motive, the government officials should include in such a patent for lieu lands, land already appropriated and occupied for military purposes, or for any other public purpose, and which could not lawfully be sold or conveyed at all, did Congress, by the said proviso intend to bar or ~~cor-~~ *prohibit* ~~rect~~ any action to correct the wrong?

It seems to us that by this proviso Congress intended merely to protect patents for such lieu lands from attack for any mistake or irregularity of officers, *acting within the scope of their authority.*

By the Act of August 5, 1892, Congress expressly authorized the grantee to select lands in lieu of those relinquished by it;

“* * * an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any State into or through which the railway owned by said railway company runs
* * *.”

This is the only authority for the selection or patenting of any lands in lieu of those relinquished, and this expressly exempts mineral lands.

Did not Congress, by this proviso, intend to protect patents for lands thus selected, that is “non-mineral public lands” without intending to go further and to protect every patent for lieu lands

however unlawful may have been its issue or however fraudulent its procurement?

From an early day it has been the uniform policy of Congress and of the Government to classify and dispose of the public domain according to its nature; as agricultural, mining or stone and timber lands; and to provide different modes and kinds of payment for the acquisition of these different classes of lands. And, except in cases of purchase, or commutation for cash, no land of one class can be acquired or patented under the modes or for the consideration provided for either of the other classes of land.

This has been the long, uniform and continuous policy and practice of Congress and of the Government, and with reference to which all laws providing for the disposal of public lands must be construed, so as to make them all a harmonious whole.

In harmony with this, all of the many laws granting lands to aid in railroad construction, expressly limit the grant to agricultural or non-mineral lands. And what seems to us conclusive of the question is the fact that the very act under which it is alleged this selection was made and patent issued, itself expressly limits the authority to make such selection or to issue such patent to lands that are non-mineral.

In view of what we have already stated is it not fair to presume that when Congress came to add this proviso to Section 1 of the Act of Mar. 2, 1896, it intended to protect patents which were, by law

authorized to be issued, and that it did not intend thereby to in any manner prevent the bringing or maintaining of actions to cancel patents issued for such lieu lands when such patents had been unlawfully issued or had been procured by the fraud and deceit of the patentee. That we cannot impute to Congress the latter intention would seem apparent from Section 2318, Revised Statutes, which provides:

“In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.”

And the Supreme Court has said in the case of *Deffeback vs. Hawkes*, 115 U. S. 392-404:

“It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of the sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preemption or homestead laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas.”

To say that this proviso applies to the case at bar, is to say that, notwithstanding all this and the uniform policy and practice of Congress and the Government, lands which are known to be mineral and which have been classified by the land Department as mineral, may be by fraud and deceit

selected and patented as lieu lands. It does not seem to us that such is the proper construction of this proviso.

One of the fundamental legal presumptions is that which presumes that a legislature never intends to stultify its acts by enacting inconsistent or conflicting laws, but that all its laws in *pari materia* are intended to be consistent with each other and to form a harmonious whole. And all laws must, when possible, be so construed as to not violate that intention. And in view of the long continued and uniform policy of Congress, expressed in numerous statutes, and of the decisions of the land Department and as recognized and asserted in many decisions of the Supreme Court, that public lands shall not and cannot be disposed of except in the manner and upon the terms expressly provided by statute for their disposal it seems to us, by every principle of legal construction that this proviso should be so construed that it will be harmonious and consistent with this long and uniform policy and with all of the other statutes with reference to the disposal of mineral lands.

We are bound to assume that Congress, in enacting this proviso, had in mind its various enactments upon this subject, and the uniform policy of the Government and the decisions of the Supreme Court with reference to mineral lands; and we are equally bound to presume that it did not, by this proviso, intend to depart from all this. And it seems entirely fair to presume that Congress had

in mind and intended thus to protect only such patents for such lieu lands as might be lawfully given away as such without intending to make valid every patent to lieu lands issued contrary to express law or procured by fraud and deceit.

In construing statutes courts often depart from the literal language and change its grammatical construction, or add or reject words, when found necessary to give such statutes the meaning intended by the legislatures enacting them.

The case of Northern Pacific Ry. Co. vs. United States, 176 Fed. 706, was one brought by the United States to cancel a patent for lieu lands issued to the railroad company, upon the ground that the lands in question were mineral and, therefore, could not be legally granted as such lands. In the lower court a decree was rendered in favor of the United States and upon appeal by the railroad company the Circuit Court of Appeals affirmed the decree.

That case differs from the case at bar in this; that while the railroad company had relinquished the original lands it was because they were found to be within the limits of a national reserve, and not "in consequence of the failure of the United States or its officers to withdraw them from entry or sale." Otherwise that case is on all fours with the case at bar, and like the case of Deffeback vs. Hawkes, *supra*, is emphatic in the statement that mineral lands cannot be lawfully granted to a railroad company as lieu lands, and that such a patent will be set aside for that reason alone.

If in a case where a railroad company has relinquished to the United States a portion of its granted lands because they are found to be within a national reserve and has received patent for mineral lands in lieu thereof, such patent may be set aside because mineral lands cannot thus be disposed of, it is difficult to see on principle why a different rule should prevail where the original granted lands have been relinquished because of valid claims of settlers attaching thereto and patents have issued to mineral lands in lieu thereof. Especially is this true where, as in the case at bar, the lieu lands were not only mineral lands, but were known to the grantee to have been classified as and held by the Department to be mineral lands at the time of the filing of the lieu selection list.

When congress had in so many acts, and so uniformly, declared that mineral lands should only be disposed of in the mode and upon the terms provided by law for their disposal, and in every act granting lands to railroads and in every act granting lieu lands to railroads, had expressly and carefully provided that no mineral lands should be thus granted, selected or patented, it had a right to assume that its mandate would be obeyed and that no patent for lieu lands would be issued covering mineral lands. And, when, by this proviso, it undertook to protect patents for lieu lands, it is entirely fair to presume that it had in mind and intended to protect only those patents which it had authorized by statute. And it seems to us that it would be out

of all reason to suppose that it is intended to protect, validate and confirm patents issued in violation of its laws or procured by fraud and deceit.

In the case of *Diamond Coal and Coke Co. v. United States*, 233 U. S. 236, 238-239, Mr. Justice Van Devanter, in delivering the opinion, said:

“As the arguments of counsel have taken a wide range and in some respects have departed from the settled rules of decision applicable in cases like this, it will be appropriate to restate those rules before turning to the evidence. They are:”

“1. Questions of fact arising in the administration of the public land laws, such as whether lands sought to be entered are mineral or non-mineral, are committed to the land officers for determination; and as their decision must rest largely or entirely upon proofs outside the official records, it is possible in ex parte proceedings, as was the case here, for applicants, by submitting false proofs, to impose upon those officers and secure entries and patents under one law, when if truthful proofs were submitted the lands could not be acquired under that law but only under another imposing different restrictions upon their disposal. A patent secured by such fraudulent practices, although not void or open to collateral attack, is nevertheless voidable and may be annulled in a suit by the Government against the patentee or a purchaser with notice of the fraud.”

And in the case of *Burke vs. Southern Pac. Ry.*

Co., 234 U. S. 669, 692, Mr. Justice Van Devanter, in the course of the opinion, said:

“Of course if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral land law, or if they issue such a patent fraudulently, or through mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who had acquired such rights to the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, and not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent issued and were not prejudiced by it.”

It may be asserted that the court in rendering its decision in the case of *Burke vs. Southern Pac. Ry. Co.*, supra, did not have in mind Section 1 of the Act of March 2, 1896, but on page 693 we find the following:

“The patent here in question was issued July 10, 1894. Apparently the Government never brought a bill to have it vacated or annulled, and the time for doing so apparently expired in 1900, or 1901. Acts March 3, 1891, 26 Stats. 1093, c. 559; March 2, 1896, 29 Stats. 42, c. 39, Section 1.”

If the land, covered by the patent in question, at the time the lieu land selection list was filed in the

local land office and at the time patent issued therefor, had been held under valid and subsisting mining locations which locations complied in all respects with the mining laws of the state of Montana and the statutes of the United States, there could be no question but what the owners of such mining locations could have maintained a bill in equity to have the patentee declared a trustee for them, and yet, according to the construction placed on this proviso by the court below, the Government is barred from maintaining an action to regain the title to the land fraudulently acquired by the patentee. In other words under the same conditions the subject may maintain an action which the Sovereign may not maintain.

We respectfully submit that the proviso of Section 1 of the Act of March 2, 1896, was not intended to apply to patents fraudulently procured or unlawfully issued by inadvertence or mistake, and that the court erred in holding that the action at bar was barred and prohibited by virtue of such proviso.

SPECIFICATIONS OF ERROR NOS. 13, 14 AND 15.

If the proviso of Section 1 of the Act of March 2, 1896, with reference to patents issued for lieu lands does not apply to patents issued for such lands after the passage of said act, or even if such proviso does apply to such patents issued after the passage of said act but does not apply to patents

procured by fraud or unlawfully issued through inadvertence or mistake, then the court erred in sustaining the motion to dismiss the amended bill of complaint, and in holding that under said bill of complaint the complainant was not entitled to the relief in equity therein prayed for, and in entering the decree dismissing the amended bill of Complaint.

Respectfully submitted,

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HOMER G. MURPHY,

Assistant U. S. Attorney,

FRANK WOODY,

Assistant U. S. Attorney.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Appellant,

vs.

ST. PAUL, MINNEAPOLIS and MANITO-
BA RAILWAY COMPANY, a Corporation,
and GREAT NORTHERN RAILWAY
COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLEES.

VEAZEY & VEAZEY,

Attorneys for Appellees.

Filed May

Filed

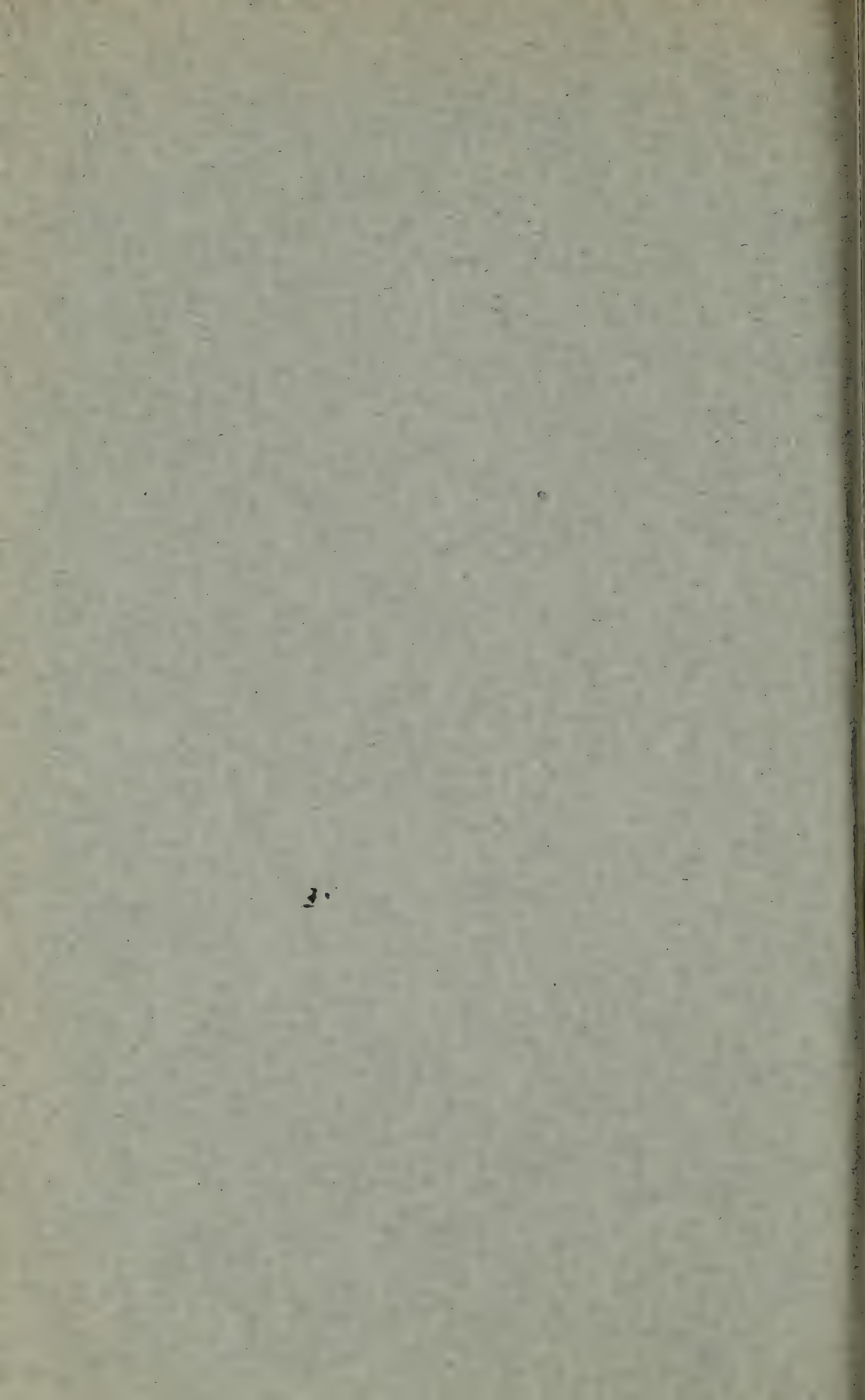
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MAY 7 - 1915

F. D. Monckton,

Clerk.

Clerk



No. 2564

UNITED STATES
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BA RAILWAY COMPANY, a Corporation,
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COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLEES.

The action in which this appeal is taken was brought by the United States to annul a patent to certain land in Flathead (now Lincoln) County, Montana. It may be remarked that the case was first brought in the name of the United States in its own behalf and on behalf of certain alleged mineral claimants, and, on a demurrer to the original bill of complaint, under the old practice, Judge Rasch, then presiding in

this district, held that the proviso to the statute of limitations of 1896, hereinafter cited, barred the suit, as far as the interests of the United States were concerned, but that the statute would not apply in so far as the United States were suing in behalf of, and as trustee for, the alleged mineral claimants, who pretended to desire to acquire the title under the mining laws.

Thereafter the alleged mineral claimants filed a disclaimer, and thereupon the United States filed an amended bill, seeking to have the patents annulled for the benefit of the United States, and to this bill, under the new practice, we interposed a motion to dismiss, on the ground that the bringing of the suit was forbidden by the act of 1896 in question.

By reason of the simpler form which the suit has now assumed, much that was pertinent in the briefs in the suit as originally brought is, it seems to us, immaterial here, and hence we assume that we will not be required to re-argue any of the matters presented at the hearing below, other than those now summarized.

A.

NATURE OF ACTION AND GROUNDS OF MOTION TO DISMISS.

The action, as stated, was brought by the United States against the St. Paul, Minneapolis and Manitoba Railway Company and the Great Northern Railway Company to annul a patent

to certain lands comprising something over one hundred acres in Flathead (now Lincoln) County, Montana, which lands had been theretofore selected by and patented to the Manitoba Company under the Act of August 5th, 1892, 27 St. 390, granting to the Manitoba Company the right to select lieu lands in lieu of certain Dakota lands which had been relinquished by the Manitoba Company to the United States, because of the failure of the government and its officers to withdraw the same from sale and entry, whereby confusion was caused by reason of the conflicting claims made by the Manitoba Company and the settlers upon those lands induced by the omissions of the government officers, which confusion was only relieved by the Manitoba Company relinquishing the Dakota lands to the government, as aforesaid, in return for the lieu land grant of August 5th, 1892.

It is charged in the bill that, by the Act of August 5th, 1892, constituting the Manitoba Company's lieu land grant, the company was authorized to select in return for the relinquishment of the Dakota land "an equal quantity of non-mineral lands, so classified as non-mineral at the time of the actual government survey, which has been, or shall be, made of the United States." The bill avers that, by this act, the company was authorized to select only lands which were non-mineral in fact, but that the lands in question in this suit were in fact mineral, and

known to be such by the Manitoba Company, which, however, fraudulently and falsely represented them to be non-mineral and, by fraud and imposition upon the government, obtained the lieu land patents now sought to be annulled.

The Manitoba Company, and the Great Northern Company as its successor in interest, have moved to dismiss the amended bill for want of equity and on general grounds. In addition the motion to dismiss specified that the bill shows upon its face that it is filed in violation of the provisions of the Act of March 2nd, 1896, 29 Sts. 42, defining the time within which, and the conditions under which, suits to annul land patents may be brought and providing that "No suit shall be brought or maintained, nor shall recovery be had for lands, or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government, or its officers to withdraw the same from sale or entry." In reliance upon this proviso of the statute, the motion to dismiss specifies in the language of the statute:

"4. It appears from said amended bill of complaint that the lands described in said amended bill of complaint, the patent to which the complainant seeks to annul, were and are lands that were patented in lieu of other lands covered by a grant which were relinquished by the grantee in consequence of the failure of the government and its officers to withdraw the same from sale and entry; and, by said amended bill of complaint, it

appears that said suit is brought and recovery is sought by the complainant for lands that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the government and its officers to withdraw the same from sale and entry; and, by reason of the premises, the said suit, as appears from said amended bill of complaint, is brought in violation of the provisions of Chapter Thirty-nine (39) of the Acts of the Fifty-fourth Congress of the United States, approved March 2nd, 1896, 29 Stats. 42, and the same is brought without authority of law, and the complainant's alleged cause of action is barred by the provisions of said statute."

B

STATUTES INVOLVED

The motion to dismiss and the amended bill of complaint refer to two statutes, which are involved in the suit. The first is the Act of August 5th, 1892, constituting the Manitoba Company's lieu land grant; and the second is the Act of March 2nd, 1896, constituting the statute providing for the time within which, and the conditions under which, suits may be brought to annul patents to railroad lands.

(1)

The Manitoba Company's lieu land grant.

The purpose of the Act of August 5th, 1892, was to avoid the confusion following the failure of the land department to withdraw from sale and entry certain lands now within the States of North and South Dakota, which had there-

tofore been granted to the predecessors in interest of the Manitoba Company in aid of the construction of railroads. By the grant to the predecessors in interest of the Manitoba Company the United States had given in aid of railroad construction certain sections of land on each side of the lines of railway of the predecessors in interest of the Manitoba Company within the limits of the then Territory of Minnesota. Afterwards the State of Minnesota was formed, and the *western* boundary of the State as fixed by the Act creating the State, was some miles to the *east* of the former western boundary of the Territory of Minnesota. The intervening strip constituting the western portion of the Territory was thus cut out of the land taken to form the State and was added to Dakota Territory.

The Land Department erroneously took the position that, as the grant to the predecessors in interest of the Manitoba Company comprised sections on each side of the railways only in the Territory of Minnesota, it followed that, upon the formation of the State of Minnesota, those railways lost the right to the lands in the western part of the Territory of Minnesota when they were severed from the lands taken to form the State and were made a part of Dakota Territory. The officers of the government accordingly held that these lands thus added to

Dakota Territory did not pass under the grant and declined to withdraw the same from sale or entry. Thereupon settlers entered upon these lands and in many instances obtained patents to them under the homestead and other land laws.

In the meantime, the Manitoba Company, as successor in interest of the railroad companies brought suits to have some of these settlers evicted and judgment was finally rendered by the Supreme Court of the United States, adjudging that these lands passed under the grant in aid of the railroads, and deciding that the settlers might be evicted.

St. P., M. & M. Ry. Co. vs. Phelps,
137 U. S. 528; 11 Sup. Ct. 168.

To avoid this threatened danger the Act of August 5th, 1892, was passed, providing that the Manitoba Company, as successor in interest, should relinquish to the United States these Dakota lands, which had thus been settled upon and even patented in some cases because of the failure of the government and its officers to withdraw them from sale and entry, and that, upon such relinquishment being made, such settlers and patentees should be entitled to the lands in the same manner as if such lands had not been previously granted in aid of railroads. The Act also provided that in return for this relinquishment "The said railway company is hereby permitted to select in lieu of" said relin-

quished lands "an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual government survey which has been, or shall be, made of the United States."

This history of the Manitoba Company's lieu land grant is sufficiently set forth in its preamble, which reads as follows:

"Whereas under the rulings of the General Land Office the extension into Dakota Territory, now States of North Dakota and South Dakota, of the limits of the grants of land made by Congress to aid in the construction of the several lines of railroad now owned by the Saint Paul, Minneapolis and Manitoba Railway Company was denied, and in consequence of said rulings lands within the limits of the said grants in the said States have been claimed, settled upon, occupied, and improved by numerous persons in good faith under color of title or of right to do so derived from the various laws of the United States relating to the public domain, and are now claimed by them, their heirs, or assigns, and many of said lands have actually been patented to such occupants or to their grantors; and

Whereas under recent construction of said grants the said occupants, improvers, or purchasers, are liable to be evicted from their holdings; Now, therefore, for the purpose of relieving the said occupants, improvers, and purchasers of the said granted lands from the hardship of being now deprived of the same under the circumstances aforesaid," etc.

As the lands, the patents to which the government now seeks to annul, were thus patented to the Manitoba Company, as appears from the bill of complaint, by virtue of lieu land selec-

tions under the provisions of this Act, it clearly appears that they (the Flathead County lands here involved) are "lands * * * that were certified or patented in lieu of other lands (Dakota lands) covered by a grant (to the predecessors in interest of the Manitoba Company) which were * * * relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry," they thus come clearly within the proviso of the Act of 1896 forbidding the maintenance of suits to annul patents to such lieu lands.

(2)

The statute fixing the time within which, and the conditions under which suits may be brought to annul railroad land patents.

This last statute, the Act of March 2nd, 1896, is the second statute herein involved, and by reason of the necessity of examining its various provisions because of the contentions of the government, and for the convenience of the Court, it is here quoted in full; the proviso with which we are concerned being capitalized:

"CHAP. 39. An Act To provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes.

BE IT ENACTED BY THE SENATE
AND HOUSE OF REPRESENTATIVES
OF THE UNITED STATES OF AMERICA

IN CONGRESS ASSEMBLED, That suits by the United States to vacate and annul any patent to lands *heretofore* erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents *hereafter* issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands *held* by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed; PROVIDED, THAT NO SUIT SHALL BE BROUGHT OR MAINTAINED, NOR SHALL RECOVERY BE HAD FOR LANDS OR THE VALUE THEREOF, THAT WERE CERTIFIED OR PATENTED IN LIEU OF OTHER LANDS COVERED BY A GRANT WHICH WERE LOST OR RELINQUISHED BY THE GRANTEE IN CONSEQUENCE OF THE FAILURE OF THE GOVERNMENT OR ITS OFFICERS TO WITHDRAW THE SAME FROM SALE OR ENTRY.

SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously *patented or certified* shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the

title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands *patented or certified* to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the Acts of the second session of the Forty-ninth Congress.

SEC. 3. *That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification, for said land until such claim is investigated in said Department of the Interior; and if it shall appear*

that such person or corporation is a bona fide purchaser as aforesaid, or that such person or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified." (Approved, March 2nd, 1896.)

C

THE POSITION TAKEN BY THE GOVERNMENT.

It has always, of course, been conceded by the government that the lands involved in this suit are (in the exact language of the proviso in the Act of March 2nd, 1896) "lands that were certified or patented in lieu of other lands covered by a grant which were relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry," but an effort was made in the argument to escape the apparently clear prohibition of the statute upon five grounds.

First, it is urged that the proviso refers to lands "patented" and hence it is argued that the proviso is limited to patents issued prior to the passage of the Act; it is said that the proviso is retrospective in its operation and not prospective.

Second, it is said that the amended bill of complaint alleges a case of fraud; that fraud

vitiates all transactions, and hence that the statute was not intended to apply to cases of fraud.

Third: It was argued that the history of the legislation shows that it was aimed at a particular condition and that it was not intended to apply to the present case; hence, though admittedly within the letter of this law, the case is not within its spirit.

Fourth: It was argued that the proviso is intended to refer to lieu lands patented by the government officers absolutely without authority of law, and not to patents issued under any Act of Congress. It is said, in the brief filed by the government, that "there is nothing to indicate that Congress had in view a selection authorized by an Act of Congress and which, if otherwise regular, needed no statute of limitations for its protection," and that "the proviso was intended to apply only to lands which the company had no right under the law to select."

Fifth: It was contended that the whole matter is controlled by the repeated declarations of the government, and its well-known all pervading policy, that mineral lands shall not be acquired except in accordance with the mineral laws, and that, therefore, the statute must be construed in the light of the government's policy regarding the acquisition of mineral lands, and it is contended that, as the selection of mineral lands under a railroad grant would be a selection not authorized by law, a patent to such lands

under a railroad grant would be void and the proviso must be construed to refer only to patents which could lawfully be issued. It is said that by the act in question Congress "intended to protect patents which were by law authorized to be issued," but not "when such patents had been unlawfully issued." Again it is said that "Congress intended to protect patents from attack for any mistake or irregularity of officers acting within the scope of their authority," and that apparently in passing upon the mineral or non-mineral character of land the officers are not acting within the scope of their authority.

We may remark at the outset that these quotations from the Government's brief show that the fourth and fifth grounds are inconsistent.

D

ARGUMENT.

I

*The Statute Applies to All Patents and Is Not
Merely Retrospective in Its
Operation.*

The first contention made by the government was that the proviso is only retrospective in its operation and does not apply to patents issued after the passage of the act. The proviso declares that, "no suit shall be brought or maintained for lands that were "*certified or patent-*

ed” in lieu of other lands which were relinquished by the grantee in consequence of the failure of the government, or its officers to withdraw the same from sale or entry.”

It is urged by the government that the proviso declares that suits shall not be brought for lands “*certified or patented*” in lieu of other lands. It is said that the expression “certified or patented” is in the past tense, and hence the proviso can refer only to lieu land patents issued in the past—prior to the passage of the act.

But even *if it be conceded that the words “certified or patented” are in the past tense*, this is not at all decisive of the matter, as *the question then arises from what point of time does it relate back*. To say that it refers to the date of the passage of the act, and that the proviso refers only to lieu lands “certified or patented” *prior to the passage of the act* is to beg the question. We contend that even with an admission that the proviso is in the past tense it forbids the initiation of any suit “for lands certified or patented” *prior to the institution of the suit*.

The *same expression “patented” occurs in other portions* of the statute defining the policy of the government in suits to annul railroad land patents. To hold, therefore, that the expression speaks only from the date of the passage of the act, and not from the date of the institution of the suit, would too seriously impair the efficien-

cy of the somewhat elaborate system established by this act for the protection of bona fide purchasers.

For example, in section 2, the act provides that "if any person claiming to be a bona fide purchaser of any lands "*patented or certified*" shall prove his claim to the satisfaction of the Secretary of Interior, suit shall not be brought for the recovery of the lands "*patented or certified*" but only "against the patentee or the person for whose benefit the certification was made" for the recovery of the *value* of the land. The same section provides that "any bona fide purchaser of lands "*patented or certified*," if he has not presented his claim to the Secretary of Interior, may establish his right in the suit.

As another example, by section 3, it is provided that if, before suit, a claim is filed with the Secretary of the Interior by a person claiming to be a bona fide purchaser "of any *patented or certified* lands" by virtue of a deed or otherwise from the original patentee, suit shall not be brought for the recovery of the lands until the land department has investigated the claim, and, if the claim is found to be just, no suit shall be brought against the bona fide purchaser, but only against the patentee to recover the value of the land.

Note, also, that immediately preceding the proviso is a direction that "no patent to lands *held*" by a bona fide purchaser shall be annulled.

It will scarcely be contended that these elaborate provisions for the protection of bona fide purchasers relate only to lands patented before the passage of the act, and yet in each case the words "patented or certified" are used. In these sections the act says that, under certain contingencies, no suit shall be brought against a bona fide purchaser of lands "patented or certified:" in the proviso the act provides that no suit shall be brought for lands that were "*certified or patented*" as lieu lands for relinquished lands. Why should the words "*certified or patented*" in one case be construed properly as applicable to lands "certified or patented" before or after the passage of the act, but in the other case only to lands "certified or patented" prior to the passage of the Act? *Since* it is conceded that, in these various sections of the act, *the words "patented or certified" relate back*, not from the date of the passage of the act, but *from the date of the institution of the suit, it follows* that the words "*certified or patented*" *must have the same effect in the proviso, and refer to* lands "certified or patented" *at any time prior to the commencement of suit.*

Even if it is conceded that these expressions indicate the past tense, the question still remains, as stated, whether the implication is that the tense speaks from the date of the passage of the act, or from the date of the institution of the suit. If the statute is to be amplified, it is more

natural, in view of its general scope and the plain intention to establish *a rule of continued policy*, that the additional words qualifying “certified or patented,” by implication, should be “prior to the institution of suit” rather than “prior to the passage of this act.”

That this is correct seems to be indicated also by the fact that in the 3rd section, where Congress takes perhaps greater care to specify the time from which the past tense is to be deemed to speak, it will be noticed that the act directly refers to “any time prior to the institution of suit.”

In this connection also we note that the last event mentioned in the proviso prior to the words “certified or patented” is the institution of a suit, and, therefore, even if doubt existed on the theory that the statute did not expressly state the time from which the words certified or patented should relate, and construction was necessary, *those words would, under a well-known rule of grammatical construction, refer back to the event last specified* before the words “certified or patented,” to-wit: the institution of a suit. The proviso says that “no suit shall be brought for lands that were certified or patented in lieu of other lands” etc. of the character discussed. *The last event specified is the institution of a suit, and hence these words “certified or patented” must be construed to speak from*

the time of the last event mentioned, to-wit: the bringing of a suit.

Moreover, *if it was the intention* of Congress to limit the operation of the proviso to patents issued prior to the passage of the act, *the expression used, "lands that WERE certified or patented," is not an apt one. The more natural, and in fact the only technically grammatically correct expression* to convey this meaning *would have been "lands that HAVE BEEN certified or patented."* It is inconceivable that if Congress had intended the proviso to operate only retrospectively, this last usual and technically correct expression, referring to lands that have been certified or patented, would not have been used. The failure to use this expression is, therefore, a strong argument against finding in the statute an intention that it, or the proviso, shall be limited only to a retrospective operation. To express such an intention the words "WERE PATENTED" are awkward, and, for reasons now to be stated, are also grammatically incorrect; to express such an intention the words "HAVE BEEN PATENTED" would be fluent and technically accurate.

Note, that, in the only instance where the act was intended to operate retrospectively only, express reference is made to "patents heretofore issued."

We have assumed so far that the government is correct in its contention that the statute, by

reason of the use of the words “patented or certified” is in the past tense, and we have endeavored to show that teven then the past tense speaks, not from the passage of the act, but, from the time of the institution of suit. *But*, in fact, the act is not expressed in the past tense. *The proviso is worded in the imperfect, not the past tense. The expression used* is not simply “certified or patented,” but “*were* certified or patented,” which necessarily indicates the imperfect tense, and *refers, therefore, to a continuing course of conduct.* This, in fact, is the only tense, and the only expression which would be grammatically proper to express the intention which we are contending has been expressed, to-wit: a continuing course of conduct, a continuing governmental policy applicable not only to patents previously issued, but to all patents whenever issued, a complete system covering the subject of railroad patents.

The imperfect tense is thus defined in the Century Dictionary:

Imperfect:

Adj. in gram.: Designating incomplete or continuous action, or action or *condition conceived as in progress* when something else takes place.

Noun: in gram.: An imperfect tense; a *past continuous tense*.

If the proviso had been intended to refer only to patents issued prior to the passage of the act

it should be noted that this meaning cannot be made grammatical by inserting in the proviso, as actually drawn, or merely adding, a few words expressive of that intention. For example, the proviso would not be grammatically correct if we should add an express declaration of such an intention, by changing the proviso, by addition, so that it would read as follows:

“But no suit shall be brought or maintained for lands that *were certified* or patented *prior to the passage of this act* in lieu of other lands,” etc.

The use of the imperfect tense instead of the past tense in this instance would be grammatically incorrect.

In order to express such an intention, it is necessary not only that an addition be made to the proviso, but also that it be redrafted by the elimination of the word “*were*” and the substitution of the words “*have been*,” so that the proviso would read:

“But no suit shall be brought or maintained for lands that *have been certified* or patented *prior to the passage of this act* in lieu of other lands,” etc.

On the other hand the intention which we contend is expressed might be stated with more verbosity by mere additions to the statute, without the necessity of any substitution, so that the proviso would read as follows:

“But no suit shall be brought or maintained for lands that were certified or patented prior to the institution of suit in lieu of other lands,” etc.

In fact this change would be *simply a concession to verbosity* and the proviso, as so modified, would not be clearer; as actually drawn the proviso expresses this exact intention in concise form and with strict regard to grammatical construction.

The entire statute is plainly intended to constitute a continuing governmental policy, to establish a system applicable to a course of future events and to all cases of patents to railroad lands. This is especially plain and *expressly* provided in the proviso by the use of the word “were,” which indicates the imperfect tense, and therefore a course of conduct or events, and the same tense is *implied* by the use of the words “patented or certified” in other portions of the statute.

The government itself in its brief declares that Section 1 of the Act of 1896 is divided into four parts. First, it provides the time within which patents issued prior to the act may be set aside. Second, it provides the time within which patents issued after the passage of the act may be set aside. Third, it then protects the title of bona fide purchasers, and clearly this refers to lands patented as well after as before the passage of the act. Fourth, there is the proviso in question which, with equal clearness, refers to lands patented as well after as before the passage of the act. The government’s own summary or detailed analysis of the section thus

shows that the first subdivision relates to patents issued before, the second subdivision to patents issued after, and the last two subdivisions to patents both before and after the passage of the act.

A reading of the section indicates the progress of the legislative mind from limited, confined fields to general, unbounded areas. Thus, first it confines its attention to prior patents. Then it progresses to the second field, or future patents, and, finally, having covered these limited areas, it progresses into the domain of a continuing policy applicable to all patents, past or future, by protecting all bona fide purchasers and by protecting lieu land patents of the peculiar character here involved.

In the first two subdivisions Congress was careful to distinguish between prior and future patents. Certainly the government will concede that in the third subdivision these restrictions had been abandoned, and that the legislative attention was then directed to patents generally. What ground is there for assuming that *in then progressing* from the third to the fourth subdivision *Congress was reverting* to the first.

To carry out the government's construction the orderly arrangement would have been to have inserted the proviso in the first subdivision. The fact that the proviso was not made a proviso only to the first subdivision shows that

it did not belong there, and was not intended as a limitation only upon the first subdivision. Its place at the end of the section makes it, by its position, a proviso modifying not merely limited portions of the section, but modifying the entire section, as well the portions of the section relating to future patents, as the portion relating to past patents.

Our view as to the meaning of the words of the proviso is thus strengthened by its position in the section as a proviso to the entire section, and not as a proviso to any single portion. To sustain the government's contention it is thus necessary in logical and orderly procedure to change the wording of the proviso and also its position in the section, so that the section would read:

“That suits to vacate any patent to lands heretofore issued shall be brought only within five years from the passage of this act; provided that no suit shall be brought for lands that have been certified or patented in lieu of other lands relinquished by the grantee in consequence of the failure of the government to withdraw the same, and suits to vacate patents hereafter issued shall only be brought within six years after the date of the issuance of such patent, but no patent to any lands held by a bona fide purchaser shall be vacated.”

There is no authority in law for the judicial branch thus reediting in this double aspect the work of the legislative branch. Any meaning can be found in any statute if we are thus per-

mitted to substitute words and rearrange their positions. Greater violence could not be done towards any statute than is asked by the appellant in this case.

It is, therefore, literally true that, if Congress intended to express the intention now suggested by the government, Congress has failed to use the most natural expression (lands that *have been* patented) for that purpose, and, in fact, the only expression that grammatically could be used to express that intention, and at the same time has used an expression (the imperfect tense; lands that “*were* patented”) that grammatically is incapable of expressing that intention, and Congress has likewise failed to place the proviso in an orderly position immediately after the first subdivision, and has given it a position as a proviso to the entire section.

On the contrary, if Congress had intended to express the intention that the proviso should establish a continuing governmental policy, applicable to all patents issued in the course of time, Congress has used the only expression (the imperfect tense; lands that “*were* patented”) that grammatically is capable concisely and accurately of indicating such an intention, and has accurately placed the proviso in its logical and orderly position. To sustain the government’s contention, therefore, it is necessary either to assume that the statute is not grammatically drawn, or drawn in an orderly way, or to do vio-

lence to the exact language of the statute by substituting other words in the place of those used, and to rearrange them in the section, and the court is asked to do this in spite of the fact that the proviso as actually drawn is grammatically correct, is plain in its direction and is consistent with the remaining portions of the statute, which provide, in common with the proviso, for a continuing governmental policy.

Moreover there is no reason for confining the policy of the proviso to past patents. If, for reasons hereafter to be shown, the policy declared by the proviso is only fair, honest, and just and prompted by the Government's sense of fair play between the parties, the same policy would, with equal reason, apply to future patents.

II

Are Cases of Alleged Fraud Excepted from the Operation of the Statute?

Considering next the contention that cases of fraud are excepted from the operation of the proviso, we find no reason given why such should be the case.

In the first place, there is no exception whatever expressed in the statute. The statute clearly commands that "no suit shall be brought" or maintained to annul patents to lieu lands of the character in question. It does not state that no suit shall be brought except suits founded

upon fraud, or except suits founded upon mistakes, or based upon any other less well-known ground for setting aside patents. *No express exception is stated*, and, on the contrary, *the statute* expressly negatives any exception in that it *commands that "no suit shall be brought,"* and hence if any exception is to be found it must be by reason of some fair implication as to the probable intention of the framers of the statute, which must be shown fairly to qualify, in some way, the positive direction that "no suit" shall be brought.

But *no such exception can be* justly or *reasonably implied*, for the legislature, in drafting this statute, *necessarily had cases of fraud in mind*. The statute provides the time within which, and the conditions under which, land patents may be annulled, and as *the most common grounds for annulling land patents are for fraud and mistake*, and since, in fact, it is almost impossible to suggest any ground for annulling a patent other than the grounds just suggested, we must assume that the legislature had in mind the idea of attacks being made upon patents on the ground of fraud. This is strengthened by *the provisions of the statute in regard to the rights of bona fide purchasers without notice of the fraud*. The whole scope of the statute shows that the main object was to fix the time within which, and the conditions under which, land patents could be

set aside on the ground of fraud. Hence, as Congress had this very subject under consideration and was expressly protecting the rights of bona fide purchasers without notice of the alleged fraud, an implication that fraud was not intended to be covered would nullify the express provisions of the statute, but, manifestly, implications can never arise antagonistic to the express direction of a statute.

Moreover, if the government is right in contending that the direction that "no suit shall be brought" excepts from its operation cases of alleged fraud, it logically and necessarily follows that the *same implication would be proper* to restrict the effect of the statute *as to its other provisions*, so that the law would read that "suits to vacate and annul patents hereafter issued, except in cases of fraud, shall only be brought within six years" etc., and thus the *entire act would necessarily become merely an act concerning* the time within which, and the conditions under which *suits* to annul land patents may be brought, *except in cases of fraud*, and the effect of a statute as a statute of repose is practically destroyed.

Another reason why no such implication is proper is found when we *consider the object of the proviso*. It must be remembered that the proviso forbidding any suit being brought to annul patents to lieu lands is limited to lieu lands "that were patented in lieu of other lands re-

linquished by the grantee in consequence of the failure of the government, or its officers, to withdraw the same from sale or entry." The lieu lands are thus lands which were patented in return for lands relinquished to correct the errors of the land department. *As the grantee relinquishes lands as to which the title was unassailable, it is only reasonable that this act should provide that the lieu land patents, when issued, should be as valid and effective as the unassailable title which was surrendered.* The proviso does not give the grantee a peculiar advantage in this class of lands. It seems to endeavor merely to restore to the grantee his estate in the relinquished land, or rather *to compensate* him for the loss of that estate, voluntarily surrendered by him, *by giving him an estate of equal validity in other lands.* It endeavors merely to place him on as good a footing as he was before he aided the government by surrendering his estate in the lands relinquished.

Take the case in hand for instance. As an inducement towards railroad construction the government had granted to the predecessors in interest of the Manitoba Company certain lands now situated in the states of North and South Dakota. Its right to these lands was questioned, and, after years of litigation, it finally established its title as valid and unassailable. This is the title which it relinquished to the government, a title fortified by expensive litigation and a de-

cree of the Supreme Court of the United States. It is now urged that the title which the Manitoba Company received to the lieu land (in return for the relinquishment of the Dakota lands, its title to which had thus been finally established) was nothing but a privilege of being sued. The more reasonable and natural position to take is that, *as the Manitoba Company gave up an unassailable title, the government intended that it should receive in return a title to the lieu lands as unassailable as the unassailable title which was surrendered.* This principle we find carried into the proviso as a sound rule of public policy. In passing this statute of repose and in defining the time within which, and the conditions under which, suits may be brought to annul land patents, the government announces as a part of its public policy that where the patent is issued in return for a title which has been shown either by lapse of time, by suit, by presumption or otherwise, to be unassailable, which title was relinquished as an aid in the correction of the errors of the government's officers, the patent to the lieu land shall be at least as unassailable as the title which was relinquished and no suit shall be brought to annul the same.

The statute defines the time within which the government may prosecute its inquiries upon, and attack the validity of the title acquired by its grantee: as regards ordinary patents that time runs from the initiation of the proceedings

in the land office until six years after the issuance of the patent; as regards lieu lands of the limited character now in question that time runs from the initiation of the proceedings in the land office until the patent is issued, but when patent is once issued, inquiries into its validity are foreclosed.

It should be noticed that in cases that come within the proviso the government officers are assumed to have already made one mistake in the disposition of the public domain, and the grantee has already been subject to inconvenience resulting therefrom, and has, after investigation and prolonged litigation, either in the land department or in the courts, relinquished lands to the government as a means of correcting the mistake of government officers. In defining its policy in regard to the bringing of suits to annul patents, it is, therefore, quite natural for the government to recognize that the railroad company in the cases mentioned in the proviso has had more than its share of litigation and dispute, and, therefore, it has announced as a rule of policy in these cases, which necessarily presuppose that one dispute has already been had and adjusted, that the grantee, after obtaining patent to the lieu lands, shall not be further annoyed by having his title to the lieu lands contested and litigated just as his title to the relinquished land was contested and litigated. The government *limits the time* within which to in-

investigate and determine the validity of the grantee's *rights to the lieu lands to a period extending from the date of the selection to the date when the patent is issued*. During this period it may investigate to the fullest extent all matters affecting the right to make the selection, including all matters such as are charged in the bill of complaint in this case. But its conclusion in favor of the right to make the selection becomes as to it, in this limited class of cases, by virtue of this proviso, *res adjudicata* as soon as the patent is issued.

Of course if the judgments of human tribunals were mathematically accurate exceptions could always expressly be made in cases of fraud. *Since, however, judgments of human tribunals are not infallible* and are subject to very grave errors, *and since fraud cannot be mathematically proved or disproved*, and is the most difficult matter either to prove or disprove, and ingenious suspicions frequently lead to unjust judgments finding that fraud actually existed where none in fact did exist, *the law, taking a practical view of the matter, is full of instances where, for reasons of policy, the question of fraud will not be examined*. Take, for example, statutes of limitations generally, statutes of fraud requiring certain contracts to be in writing, statutes concerning wills, and many other statutes. In such cases the law does not say that fraud, or any other fact, did, or did not, exist, but declares that

policy forbids an inquiry into the subject by fallible human tribunals. In very rare instances injustice may be done, but in the great majority of cases the policy which limits inquiries by human tribunals and recognizes the danger of error is wise and justified by actual practice.

The proviso in this case, forbidding the suit which the government now seeks to maintain, contains just such a limitation, and, recognizing the possibility of error in all investigations into questions of fraud, the legislative branch has declared that no such investigation shall be conducted in any case after six years after the date of the issuance of the patent, and that, in the case of lands patented in lieu of other lands that were once patented, but were afterwards relinquished by the patentee in consequence of the failure of the government or its officers to withdraw the same from sale or entry, no suit shall be brought or maintained to annul the patent, whether on the ground of fraud, which is the most common ground, or for any other reason, but that all matters such as are charged in the bill in this case, or any other matters affecting the right to the lieu lands, must be *investigated and determined prior to the issuance of patent*, and that the issuance of the patent shall be a conclusive determination against the truth of the charges now made.

The wisdom of such legislation seems abundantly justified in the present case where it seems

that the government charges the defendant companies with actual fraud in selecting lands which the government now says were mineral in fact, though it must be conceded that, in the language of the Manitoba Company's grant, they were not classified as mineral "at the time of the actual government survey which has been or shall be made of the United States," and the court can almost take judicial notice from well-known decisions of the interior department, that, until recently, inquiries of the sort which are now sought to be made were regarded both by the railroads and by the government itself as immaterial, even where the lands were in fact mineral.

Davenport vs. N. P. Ry. C.,
32 Land Dec. 28.

N. P. Ry. Co. vs. U. S.,
176 Fed. 706 at 708.

It was formerly supposed that the classification at the time of the actual government survey constituted a conclusive rule of evidence or identification of the lands covered by the lieu land grant and, though doubtless large sums of money have been spent in reliance upon these decisions in selecting and securing patents to lieu lands, the government now seeks to charge that selections, made in perfect good faith, and with the approval of the government, were made fraudulently. A statute which forbids such an inquiry is not an unwise one, and it is indeed

unfortunate that the prohibition is not extended to all lieu lands instead of being limited to lieu lands of the character now in question.

We respectfully submit that no implication can justly be made excepting cases of alleged fraud from the operation of this statute, or of the proviso.

In fact, however, these reasons are more properly presented to a legislative department of the government as a reason why such a law should be passed, but we recognize that they are almost out of place in a discussion as to the meaning of the act in question. The act clearly provides that "no suit" shall be brought for lands that were certified or patented in lieu of other lands which were relinquished by the grantee in consequence of the failure of the government to withdraw the same from sale or entry. The statute says, without any exception, that "no suit" shall be brought, and, therefore, though the reasons why such a law is, or would be, a just one are properly presented to a legislature, they are more properly presented before such a law is passed, but, with the actual passage of the act in question, it no longer becomes necessary to discover the reasons for its passage, or for the policy there adopted, and courts, doubtless recognizing the justice of the proviso for the reasons stated, can merely rule that where the legislative branch in defining the policy of the government has stated that "no suit shall be brought," this

cannot be construed to mean that "some suits can be brought." The court by its examination of the bill of complaint ascertains that this is a suit to recover "lands (Flathead County lands) that were certified or patented in lieu of other lands (Dakota lands) that were relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry" and under the proviso "no suit" to annul such patents, no matter upon what ground, can be maintained.

Moreover, the question (if it ever was a real question) whether cases of fraud were intended to be excepted from the provisions of the act is forever set at rest by the decisions of the Supreme Court, to the effect that cases of fraud were clearly intended to be included.

U. S. vs. Chandler Dunbar Etc. Co.,
209 U. S. 447; 28 Sup. Ct. 579 at 580.

U. S. vs. Winona Etc. Ry. Co.,
165 U. S. 463; 17 Sup. Ct. 368 at 370 and 371.

The controlling principle applicable to all such questions as are here disclosed is, of course, the duty of the court to ascertain and enforce *the legislative intent*, and, if possible, to find that intent in the language in the law itself, and whenever reasonable doubt, if any, arises as to that legislative intent because of the ambiguity in the wording of the law, the court may properly search for the legislative purpose in the

general policy which is sought to be pursued, and which, though possibly in some cases, somewhat obscure in any particular part of the law, could be discovered in the legislation as a whole. Applying these well-known rules of construction, we venture to inquire in what portion or portions of this system of legislation the court can discover any indication of intention to nullify the express prohibition of the act.

Manifestly, the railway company, sustained by the opinion of the Supreme Court of the United States, could have refused to accomodate the government and could have retained its unassailable title to the Dakota lands. We must, therefore, indulge the assumption that the government would have cheerfully agreed to tempt the railway company by assurances, in advance, that the railway company's title to lands accepted for the government's convenience should be as unassailable as the title to those surrendered, and should thereby be made as equal in quality as they were made equal in quantity to the lands surrendered. The court will hardly be able to conclude that the railway company would have accepted the terms of the proposed exchange if the government had expressly declared that the invited exchange of lands should involve perpetual litigation for the railway company as to each tract to be selected. Such a theory as to the probable policy of the government involves an injustice on the part of the government of little

less merit, if any, than the alleged fraudulent conduct so loosely charged in complainant's bill against the corporation which saved the government more trouble and expense than could be measured in the money value of the lands promised to be given in exchange. The policy on the part of the government which its representatives now contend for would have been little less than a fraudulent one, and we respectfully insist that there is no language in this statute which will justify the court in finding or declaring a carefully concealed purpose on the part of Congress to obtain from the railway company its cooperative effort to relieve the situation in Dakota and give in exchange nothing more substantial than the right in the railway company to repeat its Dakota experience in the form of endless litigation with that government which it was seeking to accommodate. We insist, therefore, that *the government either intended, as shown by this law, to make its patents for the exchange lands unassailable as to all such lieu lands of the character here involved, or as to none, and that the proviso cannot be, by a forced construction, nullified only in part, but, if nullified at all, must be entirely nullified and that the act of 1896 was plainly passed for the purpose of consummating in good faith those conditions of the previous adjustment which any fair minded citizen, similarly situated, would have considered impliedly involved in an exchange of such land.*

III

*The Alleged Legislative History
of the Act.*

In regard to any references which have ever been made by the Government to any proceedings of Congress, it will be found these are very general and vague and that absolutely nothing can be found tending to show that the legislative branch did not mean just what it said. For instance, it is again repeated by the Government in its brief, as in the brief filed below, that the original bill before Congress provided for a strict statute of limitations but directed that "no patents to any lands held by a bona fide purchaser shall be vacated or annulled." Now counsel again say that while this bill was under consideration Mr. Hepburn of Iowa stated "that there were certain cases where the purchasers from railroad companies were entitled to protection, and he cited a case where the Interior Department held that lieu lands might be granted" in a certain instance, where afterwards the department concluded that there was no authority in law for the granting of such lieu lands. It will be found, however, that Mr. Hepburn's solicitation was that in the meantime purchasers had obtained the lands by purchase from the railroad companies. Thereupon, according to the contention of the Government, upon hearing Mr. Hepburn's objection, the Chairman of the Committee on Public Lands

submitted the proviso in question as an amendment.

It is obvious, however, that the proviso could not have been intended, in any way, to refer to Mr. Hepburn's suggestion, as Mr. Hepburn was concerned with protecting the purchasers and the original bill, as quoted by the Government, furnished ample protection to bona fide purchasers, and the proviso is drawn, not for their protection, but for the protection of the railroad companies, whose situation was certainly at least as, and indeed more, meritorious.

Besides it will at once be noted that it is doubtful whether the case which the Government says Mr. Hepburn had in mind comes within the proviso, for it is not clear that in such a case it could be contended that the lands were lost "in consequence of the failure of the government to withdraw the same"—rather it would seem the lands were lost in consequence of the failure of the railroad promptly definitely to locate its line, but we will assume that such a case does come within the proviso relating to lands "lost in consequence of the failure of the government," etc.

Even then, at most, if the instance referred to by Mr. Hepburn was an instance of land *lost*, the proviso, as finally passed, included cases of land *relinquished*. It seems clear, therefore, that even though Mr. Hepburn's remarks were not germane to the subject of the proviso, some

other members of Congress gave greater consideration to the entire subject and recognized that the corporation which had been subjected to inconvenience or loss by reason of the mistakes of the Land Department, and had come to the aid of the government, was entitled, at least, to as great protection as that already conferred in the original bill upon bona fide purchasers. The proviso, therefore, does not, in any way, refer to the subject of Mr. Hepburn's remark, is not germane to that subject, and constitutes an independent piece of legislation prompted by other motives and laying down a rule of public policy which seemed to other members of the legislative branch to be a just and moral one.

It should be noted that the position of the Manitoba Company is much more meritorious than the state of facts referred to in the Government's brief of the legislative history. Under these facts a railroad company, by reason of settlers occupying lands before the definite location of the railroad, had *lost lands* to which it was rightfully entitled, and the Land Department of the Government had *unlawfully and without statutory authority* patented to it lieu lands as *gratuitous compensation* for lands lost by reason of the railroad's perhaps excusable delay in locating its line.

The instant case, however, is not a case where the Manitoba Company had lost any lands. On the contrary, it had established its title to this

land, and the establishment of this title was embarrassing to the Government and to the settlers on the land. Thereupon, by express legislative enactment, the railroad consented to relinquish these lands, and the Land Department was authorized, in consideration thereof, to patent to it other lands in lieu thereof. It therefore *relinquished* lands to which it was rightfully entitled and to which it had established its right, and the Land Department, *lawfully, and under express statutory authority*, patented to it the lieu lands now in question.

If it is sound public policy to protect a lieu land patent to lands patented unlawfully and without authority, and as a mere gratuity or favor to the railroad company, in return for lands which, even without fault, the railroad had lost, but for the loss of which the Government, as a gratuity or favor, is willing to allow compensation in the form of lieu land, how much more does public policy require that the same protection be given to a lieu land patent to lands patented, lawfully and under express statutory authority for a valuable consideration, in return for lands relinquished by the railroad for the convenience and accomodation, and at the request of the Government, in order to relieve the Government and its citizens from embarrassment caused by the failures or omissions of its own officers?

So it is that we find that, when Congress was considering railroad grants, and it was proposed by Mr. Hepburn that bona fide purchasers of railroad lieu lands which might be patented to railroads unlawfully, as a gratuitous compensation donated by the government, in return for lands lost by the railroad, should be protected, the whole subject of railroad grants was considered, and it was appreciated that the situation of the railroad deserved consideration, especially in the case of lieu land patents, not unlawfully, but lawfully issued under express statutory authority, in return for lands not lost by the railroad's own failures, but relinquished by the railroad at the request, and for the accommodation, of the Government and its citizens.

Accordingly the act in question, having all these subjects in mind, provided that suits as to prior patents must be brought within a certain period, and suits as to future patents within another period, and that, as a continuing rule of policy, bona fide purchasers should always be protected, and that no suit should be brought to annul patents to lieu lands conveyed to purchasers, and that railroads also must be protected and no suit must be brought to vacate patents to lieu lands of the limited character here in question, to-wit: lands patented in lieu of other lands lost or relinquished in consequence of the failure of the Government and its officers to withdraw the same from sale or entry.

The inapplicability of the legislative history outlined by the Government (and in the brief here filed it is not as accurately outlined as in the brief below) is thus shown in two respects. First, Mr. Hepburn's remarks were directed to affording relief to bona fide purchasers and were not germane to a proviso affording protection to the railroad companies as well; and secondly, the instances which he cited were instances of lands lost by the railroad companies, while the proviso in question covers also lands relinquished.

We find, therefore, that in spite of counsel's diligent effort to find some aid in the record of the legislative proceedings concerning the enactment of this law, no passages are found which can, in any way, explain away or nullify the plain direction of the proviso. Moreover, it cannot be contended that, out of the entire membership of the House of Representatives and of the Senate of the United States, Mr. Hepburn was the only person whose mind operated in connection with the enactment of this law. Undoubtedly, other members of the Houses of Congress had in mind exactly the considerations which we have advanced, and their express judgment as to the policy which should be pursued cannot be nullified merely by an argument that the Congressional Record shows that one member of the House of Representatives did not feel that the original bill, which declared that "the

right and title of such bona fide purchasers is hereby confirmed," sufficiently protected bona fide purchasers.

Though it would be contended by the Government, in any particular case, that a statute which was ambiguous or unintelligible might be saved by construction and by reference to the records of Congress or to Legislative history, it would not be contended that such Legislative history could be resorted to where the statute is plain in its directions and intelligible and salutary in its actual operation.

Thomas vs. Vandegrift,

162 Fed. 645 at 642; 89 C. C. A. 437.

U. S. vs. Union Pac. Ry. Co.,

91 U. S. 72; 23 L. Ed. 224 at 228.

U. S. vs. Trans. Mo. Ft. Assn.,

166 U. S. 290; 17 Sup. Ct. 540 at 550.

For these two reasons, therefore, we maintain that the Legislative history referred to affords no escape to the complainant, because:

(1) The debates to which counsel refer have nothing to do with the proviso in question; and

(2) Such records can never be resorted to where the statute is intelligible and a reason is found for its practical operation.

IV.

*Theory That Proviso Applies Only to Lands
Which Company Had no Right
to Select.*

The Government next contended that the proviso in question was intended to apply only to lands which the company had no right under the law to select and not to lands patented under authority of law, that is to say, that "there is nothing to indicate that Congress had in view a selection authorized by an Act of Congress which, if otherwise regular, needed no statute of limitations for its protection."

It is an extraordinary assertion that a selection regularly made under an Act of Congress needs no statute of limitations for its protection. On the contrary, the Government has recognized that its officers may be over-zealous in the discharge of their duties, or may be biased or prejudiced in particular cases, or may be guilty of very grave errors of judgment, and for this reason, as already stated, because, for one reason or another, mistakes may be made and injustice done by any human tribunal, legislative, executive or judicial, the Government has stated, by the Act of '91, that, unless suits are brought to annul patents generally within a certain period, the patent shall stand forever unassailable; and by the Act of '96 a similar recognition is made and similar legislation passed as regards rail-

road patents. The Government has thus recognized that such legislation is needed as a statute of repose for the protection of all titles, and that there is no such thing as a patent "which needs no statute of limitations for its protection."

The contention that a patent regularly issued needs no statute of limitations for its protection assumes that human tribunals are infallible and declares that the whole system of legislation fixing the time within which, and the conditions under which, suits to annul land patents generally may be brought is a useless piece of legislation, and the contention involves the same criticism as regards every statute of limitations passed by the various states, for it is said that any act regularly and lawfully done needs no statute of limitations for its protection.

The language of this proviso is the same as the language of the entire Act, and the language of this Act is the same as the language of the other Acts of Congress relating to the setting aside of patents to public lands. If, therefore, the complainant is right in the astonishing declaration that "there is nothing to indicate that Congress had in view a selection authorized by an Act of Congress which, if otherwise regular, needed no statute of limitations for its protection," then it follows that there is nothing in this entire statute, or in any of the statutes fixing the time within which suits to vacate or annul patents generally may be brought,

indicating that Congress had in view a selection of lands authorized by any act of congress and which, if otherwise regular, needed no statute of limitations for its protection. Complainant must, therefore, be deemed to ask the court to hold that this proviso and the entire statute, and all of the other statutes of repose which have been passed by Congress, and in which Congress uses the same language as is here employed relating to the bringing of suits to annul land patents, are not applicable to lands patented pursuant to a selection or application authorized by law or which, if otherwise regular, need no statute of limitations for their protection, and all such legislation, according to the complainant, is limited in its application to land patents for the issuance of which there was no authority in law.

But, as the cases where patents have been issued absolutely without authority of law must be rare indeed, these statutes of repose are, by this argument, rendered practically useless.

The contrary contention was at one time made by the Government, and it was urged that these statutes, which are all couched in the same terms, did not apply to patents which were absolutely void because issued without any authority of law whatsoever and not under color of compliance with any law, but this position of the Government as regards the general statute of limitations found in the Act of '91 was denied

by the Supreme Court of the United States, and it has been held that that statute which, as stated, is in the same language as the present statute, and in the same language as the proviso here referred to, applies to all patents, even to those issued absolutely without authority of law and not under color of compliance with some law.

Chandler Co., vs. U. S.,

209 U. S. 447; 28 S. Ct. Rep. 579.

V.

*Theory That Proviso Does Not Apply
to Mineral or Non-Mineral
Question.*

The next position taken by the complainant was that the proviso must be deemed controlled by the language establishing the policy of the Government that its mineral lands shall not be disposed of except in accordance with the mineral laws, and that under agricultural grants or railroad grants mineral lands have always been excepted. It is argued that, as Congress has reserved all mineral lands from agricultural and railroad grants and has directed that mineral lands shall be acquired only under the mineral laws, Congress has established a well-known all pervading policy in regard to mineral lands which must control general statutes of limitations. And it is argued that the proviso for bidding the bringing of suits to annul lieu land patents must be construed in the light of this policy,

and is not applicable where, by reason of the mineral character of the lands, there was no authority in law to enter the same under the grant in question.

Strange to relate the Manitoba Company, in the very lands out of which this suit arises, has already litigated the theory that the express terms of a statute may be controlled by an all pervading Government policy.

Thus in the case of

St. P. M. & M. Ry. Co. v. Phelps,
137 U. S. 528; 11 Sup. Ct. 168,

already cited, wherein the Manitoba Company perfected its title to the Dakota lands which were subsequently relinquished in return for the lieu land privileges here the subject of dispute, the question between the parties was whether the grant of lands to the State of Minnesota, the Manitoba Company's predecessor, in aid of the building of a railroad from a point in Minnesota to a point in Dakota, included Dakota lands, and it was contended that there was an all pervading Government policy in regard to land grants to states in aid of railroads not to grant one state lands in another state, but the Supreme Court of the United States held that this all pervading policy could not control the express language of the statute apparently to the contrary. The Court said:

“We think that the language of those acts is too plain and unequivocal to need or even to admit the aid of an extrinsic rule of construction to get at the intent and meaning of congress. * * * Where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department.”

So here the clear inhibition of the statute that “no suit shall be brought” cannot be qualified by any theory of an all pervading Government policy.

It is, however, said in the brief that if, while acting under the railroad grant, the Land Department determines that certain lands are non-mineral and therefore issues a patent to the railroad covering such lands, the Department has exceeded its jurisdiction and acted unlawfully if the lands in fact contain mineral. The brief adds in this respect:

“There can be no doubt that the proviso in question, if taken literally and strictly, would forever bar any action to cancel a patent for such lieu lands no matter how entirely unlawful or ultra vires may have been its issuance. But we do not believe that Congress ever intended to throw its shield of protection over any such patent issued by the officers of the Government without authority of law.”

Yet the brief further states that, in view of this policy in regard to mineral lands,

“it seems to us that, by this proviso, Congress

intended merely to protect patents to such lieu lands from attack for any mistake or irregularity of officers acting within the scope of their authority,”

and it is thus denied that in determining the mineral or non-mineral question, the officers of the Government are “acting within the scope of their authority.”

We venture to point out that, in urging this forced construction, the complainant directly reverses itself. In the preceding argument it was contended that by the statute “there is nothing to indicate that Congress had in view a *selection authorized by an Act of Congress*, and which, if otherwise regular, needed no statute of limitations for its protection,” and that “the proviso was intended to apply *only to lands which the company had no right under the law to select.*” In the present argument, on the contrary, in order to find some way by which the proviso may be nullified, complainant argues that the Act applies *only to “patents which were authorized to be issued.”*

Passing by this inconsistency we think that a little further reflection will convince the complainant that the suggested interpretation goes too far. It was said that in view of the legislation in relation to mineral lands we are bound to assume that Congress in enacting this proviso had in mind these various enactments relating to the acquisition of mineral lands and the uniform policy of the government that mineral lands

should not be acquired under agricultural or railroad grants, and that if the land in question was in fact mineral land it could not be acquired except under the mineral laws, and that the patent in question, being a railroad grant patent, was, therefore, absolutely void, and was issued without authority of law and is not aided by the proviso which applies only to patents issued pursuant to authority conferred by law. If this contention is correct counsel must assert that it is equally applicable not only to the proviso but also to similar expressions used throughout the statute, and that it is equally applicable to the general statute of limitations set forth in the Act of '91. As already pointed out, no different expression is used in this proviso than is used in other parts of the statute in question and in the general statute of limitations, and hence whatever construction is adopted as to the proviso must be adopted as regards all of these statutes. Counsel will, therefore, be forced to assert not only that a railroad land grant to land which is in fact mineral is void and may be set aside at any time, but also that an individual's agricultural entry of land which is in fact mineral is void and may be set aside at any time, and further that an individual's mineral entry of land, which is in fact non-mineral, is likewise void and may be set aside at any time, since in each case it is true that there is an all pervading policy that mineral land shall not be acquired under agricul-

tural or railroad grants, and that agricultural lands shall not be acquired under mineral grants, and the one policy is not more sacred than the other.

Counsel would further be forced to assert that all of these patents, however ancient, could nevertheless be set aside at any time, and that there is no statute of limitations which properly construed, would forbid the maintenance of such suits.

This contention seems not unreasonable to those who are not familiar with mining localities and who doubtless assume that the mineral character of land is a mere matter of mathematics and who have never seen a prosperous farming country dotted with numerous abandoned shafts or cut by extensive tunnels, indicating the faith of some early prospector in the supposed mineral character of the country. The fact is, however, that it is a matter of very great difficulty to determine what is the actual character of a given tract of land, and this contention of the government that the validity of agricultural or railroad patents must depend upon the fact of the non-mineral character of the land, and that mineral patents must depend upon the fact of the actual mineral character of the land as the same may, at any time, be shown, would throw all government titles into confusion.

We might content ourselves with referring to the admission made in the brief that Con-

gress intended by the proviso “merely to protect patents for such lieu lands from attack for any mistake or irregularity of officials acting within the scope of their authority.” Even if it could be assumed that by the expression “no suit shall be brought” Congress intended to permit some suits to be brought and we were to narrow the scope of the statute to the extent indicated on the theory that Congress intended, in the language of the brief below, “merely to protect patents from attack for any mistake or irregularity of officials acting within the scope of their authority,” this case is directly within the statute as so construed. For it cannot be doubted that when the government officials determined that this land was non-mineral land and issued the patent in question they were undoubtedly acting within the scope of their authority, as the very selection of the land and the application for patent necessarily required them to determine the mineral character of the land. We may, therefore, accept the position taken by the complainant as to the limited scope of the proviso, and yet we find that the proviso expressly forbids the institution of this suit.

And the authorities cited by complainant themselves show that the officers of the Land Department, when so acting, are acting within the scope of their authority.

Reference is made by the Government to a case reported in 176 Federal where a patent was set aside for lieu lands issued in return for other lands within a Forest Reserve which were relinquished by the grantee, and it was said that it is difficult to see, on principle, why a different rule should prevail in the case at bar.

A controlling reason is that the Act of March 2, 1896, relates solely to lands certified or patented under railroad or wagon road grants, and the patent under consideration in the case referred to was not issued under such a grant; hence the proviso could have no application..

The difference is found in the statute. The Government has expressly declared that *no suit* shall be brought to annul patents to lieu lands that were certified or patented in lieu of other lands lost or relinquished by the grantee because of the failure of the Government, or its officers, to withdraw the same from sale or entry. The fact that Congress, in its enactment declaring the public policy of the nation, expressly included the case at bar is a sufficient reason for holding that the suit in question cannot be maintained without any necessity for inquiring why Congress did not extend that declared policy to other cases.

The suggestion is, at most, a reason for amending the Act in question so that it will include all lieu lands, for where the patent is issued, not in the nature of a gift, but as an ex-

change for lieu lands the title to which was unquestionable, it cannot be doubted that good faith and fairness requires that the title given in return should not be lightly questioned, or questioned at all, and undoubtedly if the patentee of the lieu land, before relinquishing the old land, had had its attention called to the litigation which might arise in the future it would have refused to make the exchange and give up a valid title for a title that could, at any time, be assailed. But, at any rate, the fact that Congress has not declared that this wise and moral policy shall apply to all cases is no reason for here denying the wisdom of Congress in recognizing that policy to the extent that Congress has declared that it shall be recognized, to-wit: In the case of lieu lands patented in lieu of other lands relinquished to cure mistakes of the land department.

In fact, however, it is not difficult to find a possible reason for the distinction. Perhaps Congress felt that it went far enough in declaring that those lieu lands should be favored which were patented in lieu of lands relinquished by the grantee because of the failure of the Government, or its officers to withdraw the same from sale or entry. Congress undoubtedly declared that as regards the danger of hostile litigation, lieu lands should be, to some extent, favored and perhaps Congress felt that it went far enough in limiting this favored class only to

those lieu lands which were certified or patented in lieu of lands relinquished to correct the mistakes of the government officers. There seems to be a reason for this distinction which is apparently made by the law-makers, for, as already pointed out, the proviso assumes that the patentee has already had more than its share of litigation and has suffered more than enough from the mistakes of the government and its officers. It was pointed out that, in the case at bar, the defendant, after years of litigation, had proved that its title to the Dakota lands was unassailable, and when afterwards it was requested to relinquish these lands to correct the confusion arising from the failure of the government, or its officers, to withdraw the same from sale or entry, and thus to relieve the resulting confusion the defendant company came to the aid of the government and corrected that confusion resulting from the government's own mistakes. It was, therefore, but proper for a gracious government in legislating upon the subject of suits to annul patents to provide that suits should not be brought to annul lieu land patents of the limited class here in question. The case reported in 176 Federal to which reference has been made is not at all a parallel case to this one, and the lieu lands referred to in that case were not within the favored class expressly provided for in the statute.

Counsel inquired whether the proviso would apply to a suit to annul a lieu land patent to a government fort issued by mistake on the part of the government officers. This suggestion is too far fetched and too impossible in actual life to be of any assistance. It might as well be assumed, as a helpful illustration in this discussion that a lieu land patent was issued under the Manitoba Company's act to a war-vessel. Reference to such an impossible case renders no assistance whatever.

But, as the question has been asked, we answer that, if the mistake was not of such a character that the minds of the officers of the land department did not act at all in the issuance of the patent, then, unquestionably, the proviso would defeat a suit to annul such a patent. Of course, if the mistake referred to is a clerical error, or if at the time when the patent was to be signed, one fraudulently substituted the wrong instrument and thereby the fort was granted, unquestionably this would be a case where, in fact, the minds of the officers of the land department had not operated and the so-called patent would not be a patent at all but would be a mere piece of waste-paper. Mistakes or frauds may be of such a nature as to prevent the mind of the party from operating at all in the transaction, as in a case, where at the time of the signature one instrument is fraudulently substituted for another. In such a case the instrument signed does not

constitute an act of the person signing and is mere waste-paper. A so-called patent signed under such circumstances would be no more a patent than if the officers of the land department should rise in their sleep and execute a patent. Such a suit would not be a suit to annul a patent as none in fact has ever been issued, but would be a suit to have a cloud on the title removed.

All of these instances, however, are of no assistance whatever because they do not arise in practice, but, if the question must be answered, unquestionably the proviso covers every case where the minds of the officers of the land department actually operate, and under the proviso the government must make its inquiries between the time of the filing of the selection and the time when the patent is issued, and, under the proviso, after the patent is issued, no suit shall be brought to set the patent aside.

The case of the granting of a government fort is no more startling, theoretically, than the case of the land referred to in the Chandler case, which we have cited, which land had been expressly reserved and the sale thereof forbidden. Moreover, as all of these statutes are couched in the same language, as has been heretofore so frequently observed, the question arises whether a patent of the United States to a fort would be barred under the general statutes of limitations within the period there prescribed. Under the

Chandler decision undoubtedly the statutes would apply to such a patent and this decision is, therefore, a direct authority that, under the proviso in question, all patents issued for lieu lands of the favored class referred to in the proviso are unassailable and that when Congress said that *no suit* should be brought, this does not permit some suits to be brought.

E

APPELLEES POSITION NOW SUSTAINED BY TWO DECISIONS.

The opinion of the Court is, of course, found in the transcript. Judge Bourquin, however, merely followed the opinion of Judge Rasch, before whom the case as originally brought was first heard. As his opinion, likewise denying the right of the Government to maintain the suit in its present form, never appeared in the Federal Reporter, we are taking the liberty of setting out such portions as are pertinent to the present discussion, in "Exhibit A" of this Brief.

We respectfully submit that Congress, recognizing the abundant merit of the claims of the Manitoba Company upon the Government, has enacted a wise and moral piece of legislation when it has declared that all inquiries as to the validity of the title to be conveyed in return for the relinquishment of lands relinquished to cure the Government's mistakes shall be prosecuted before the issuance of patent, and that after pat-

ent the title to the lieu lands shall be at least as unassailable as the title to the lands which were relinquished and that "no suit shall be brought" to annul the patents to lieu lands of the favored class which are here involved. We respectfully submit that no reason has been advanced why this express declaration of Congress should not be obeyed and that, on the contrary, good faith, fair dealing, wisdom and morality all demand that this direction of the legislative branch should be given full force and not needlessly and effectually nullified.

We call attention to the fact also that the question presented by the motion to dismiss attacks the very right of the Government to proceed at all with this litigation. Even, therefore, if the question involves some doubt, we submit that the two decisions on a question thus going to the foundation of the right to maintain the suit and decided adverse to that right should be affirmed, leaving the party who seeks to maintain the suit the right to have those decisions further reviewed, if deemed wise. An alternative decision in favor of the maintenance of the suit requires each of the parties to incur a great expense in a litigation which would ultimately be held to have been brought without authority of law, and further, as regards these defendants, we call attention to the fact that their costs thus forced upon them can never be recovered by reason of the sovereign character of the adverse party.

A decision in favor of the right to maintain this suit might result in useless costs being incurred in prolonged litigation disputing the matters set forth in the Bill, and these defendants, even when successful, would not be permitted to recover their costs. A decision against the maintenance of this suit, on the other hand, gives the adverse party full opportunity to have this fundamental question which arises at the outset determined by a court of last resort, and thereby saves to each of the parties the useless expense referred to.

For the reasons above set forth, the decree should be affirmed. In the event that there is any doubt upon the question, we think it a case typical of the instances where the matter should be certified to the Supreme Court, as the motion to dismiss raises a preliminary point practically questioning, or analogous to a question concerning the jurisdiction of the court to entertain the suit.

Respectfully submitted,

VEAZEY & VEAZEY,
Attorneys for Appellees.

EXHIBIT "A"

Judge Rasch, after setting forth the statute of 1896 already quoted, said in part:

"The section above mentioned in the Act of March 2nd, 1896, the limitation of which is extended to the patents referred to in the Act of March 2nd, 1896, is section 8 of the Act of March 3rd, 1891, which provides:

'That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.' 6 Fed. Stat. Ann., p. 526.

While the provisions of section 8 of the Act of March 3, 1891, are general, and, in the absence of other legislation inconsistent therewith, would have been applicable to patents issued under railroad grants, as well as to patents issued under any of the land laws of the United States, I take it that, in order to make the provisions of the Act of March 3, 1891, applicable to patents issued under railroad grants, it was deemed necessary to do so by additional legislation in view of the provisions of section 2 of the Act of March 3, 1887 (6 Fed. Stat. Ann., p. 435; 24 Stat. at L. 556), which authorized the institution of suits for the cancellation of patents erroneously issued, at any time after the expiration of ninety days from the date of demand for a reconveyance to the United States of the land so erroneously patented. 36 Cyc, 1151. Be that, however, as it may, the limitations of the Act of 1891 were extended and made applicable to patents issued under railroad grants by the Act of March 2, 1896, and the rules which govern in cases coming within the provisions of the earlier statutes must obviously be the same which control in cases aris-

ing under the later act. Complainant's contention, therefore, that the limitation prescribed by the Act of 1896, can only be invoked in cases where the patent was issued by inadvertence or mistake, and not where it was procured by fraud, can not be sustained. *United States v. Winona etc. R. Co.*, 165 U. S. 463; *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447; *United States v. Smith*, 181 Fed. 545.

I agree also with counsel for defendants that so far as the Government itself is concerned, the action comes within the proviso of the Act of March 2, 1896, and it can not maintain it in its own behalf or in its own interest, and if it were not for the alleged rights of third parties, the demurrer should be sustained."

